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INTRODUCTION

Everyone in America seems to be talking "federalism" these days. Congress passes statutes in its name[1] and floats strange proposals to increase its scope.[2] Candidates vie to be its champion. Our Democrat President invoked it in dismantling the federal welfare program.[3] The Supreme Court, of course, regularly issues encomia about it and occasionally invalidates a federal statute, passed by the apparently pro-federalism Congress, in its name.[4] Law reviews debate its merits,

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1. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48.

2. *See* S. 1679, 104th Cong., 2d Sess. (1996). This bill begins with a Congressional finding that "the United States Constitution created a strong Federal system, reserving to the States all powers not expressly delegated to the Federal Government." *Id.* § 2(1). Its substantive provision reads, in its entirety, as follows:

> No statute, or rule promulgated under such statute, shall preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless the statute explicitly states that such preemption is intended or unless there is a direct conflict between such statute and a State or local law, ordinance, or regulation so the two cannot be reconciled or consistently stand together.

S. 1679, 104th Cong., 2d Sess. (1996). By its terms, this rule would apply to subsequently-enacted state legislation.

3. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; *see* Francis X. Clines, *Clinton Signs Bill Cutting Welfare: States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

4. *See, e.g.*, Printz v. United States, 65 U.S.L.W. 4731 (U.S. June 27, 1997) (overturning federal requirement that state agents perform federally-required background checks on gun purchasers); Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996) (restricting scope of federal legislation); United States v. Lopez, 115 S. Ct. 1624 (1995) (overturning a federal statute); New York v. United States, 505 U.S. 144 (1992) (overturning one portion of a federal statute); Gregory v. Ashcroft, 501 U.S. 452 (1991) (full of encomia). The reference to the pro-federalism Congress is not at all facetious with respect to *New York*. As Justice O'Connor's majority opinion notes, the federal statute that the Court overturned on federalism grounds was developed by the National Governor's Association, and represented a compromise between states with nuclear waste disposal facilities and states without such facilities. *New York*, 505 U.S. at 151.

particularly in response to the Court's actions, with the tide running noticeably in federalism's favor.[5]

Federalism is indeed worth discussing; it is a basic, truly fundamental question of political organization. Fortunately, the United States has not needed to confront this question, as a matter of practical politics, for nearly a century. That is what makes it so much fun to talk about. Like a healthy person talking about medical care, a congenitally thin person talking about dieting, or a rich person talking about money problems, we can lavish exuberant attention on the subject without any sense of urgency or danger. Part of the fun of this process is that it enables us to avoid addressing some of the truly serious problems that confront us. But there is also an intrinsic pleasure in talking about how much one has of something that one does not need, and that other people desperately require.

Enjoyable though this debate may be, it is not particularly coherent. Because it is pursued in the absence of any real need, it often becomes a device for addressing more immediate and painful issues in an elliptical fashion, and thus ignores the fundamental character of federalism itself. Properly understood, federalism is too basic to be justified by any argument that involves individual preferences. Nor can one claim that it will implement any particular policy, such as decentralization, or any particular goal, such as economic efficiency or political liberty, because it is anterior to all these questions. One cannot even claim that it is connected to a democratic process, for it is anterior to democracy as well. It cannot be derived from natural

5. For recent articles championing the cause of federalism, see, e.g., Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993); Akhil Reed Amar, *Five Views of Federalism: 'Converse-1983' in Context*, 47 VAND. L. REV. 1229 (1994); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483 (1991); Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Richard Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS 147 (1992); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994) [hereinafter *Republican Governments*]; Deborah Jones Merritt, *Three Faces of Federalism: Finding A Formula for the Future*, 47 VAND. L. REV. 1563 (1994); Robert Nagel, *Real Revolution*, 13 GA. ST. UNIV. L. REV. 985 (1997); Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

rights theory, because it is a prior condition to the implementation of any such theory. And one cannot embody federalism in a constitution, for federalism is too large a matter for any constitution to address.

Instead, federalism can only be addressed in terms of political identity. It involves the fundamental issue of human affiliation, and the construction of a political order in relation to, although not necessarily in correspondence with, that issue. This matter of political affiliation is generally discussed under the heading of "legitimacy," a murky subject that is best avoided in ordinary political analysis, but that simply must be confronted in this context. We in the United States have had the good fortune of being able to ignore the subject because the essential legitimacy of our political order has been unquestioned for more than a century—since before the time that the parents of any living person were alive.

Part I of this Article discusses the fundamentality of federalism—its precedence over preference-based arguments, political process arguments, natural rights arguments, and constitutionalism. Part II then analyzes the question of federalism itself in terms of the debate over political legitimacy. Part III offers some speculations about why the United States has been able to avoid this issue, and what we are really talking about in our continuing debates about the subject.

I. THE FUNDAMENTALITY OF FEDERALISM

In *Younger v. Harris*,[6] Justice Black wrote that "the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways[,] . . . [a principle] referred to by many as 'Our Federalism.' "[7] In *Garcia v. San Antonio Metropolitan Transit Authority*,[8] Justice Powell wrote that "federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties."[9] These are much-quoted words,[10] but their casual use

6. 401 U.S. 37 (1971).
7. *Id.* at 44.
8. 469 U.S. 528 (1985).
9. *Id.* at 572 (Powell, J., dissenting).
10. Powell's statement in *Garcia*, for example, although written in dissent, has

of the plural possessive pronoun glosses over a fundamental question. Who are the "we" to which this seemingly insignificant little word refers? How do Justices Black and Powell know what "our federalism" and "our fundamental liberties" are, without specifying who are the "we" that exercise this possessive relationship?

The obvious answer is that "we" are the United States of America, but the very ambiguity of the term indicates the insufficiency of this response. As Ann Althouse suggests, the "we" can be defined as either the "United States"—a single political entity, or the united states—fifty mutually exclusive political entities and one additional entity that is co-extensive with those fifty.[11] This is the fundamental question of federalism, and it involves the locus of collective political decisionmaking. Indeed, it is so fundamental that it cannot be addressed by ordinary political arguments. Most of the arguments that have been offered, including those articulated by the Court, do not really resolve, or even speak to, this fundamental question. This is most apparent in the case of preference-based arguments, that is, those that involve people's choice of public policies, political goals, or even decisionmaking processes. But it is also true for arguments that transcend preferences and invoke either natural law or constitutional ordering. These two categories of arguments will be considered in turn.

Before proceeding, however, it is necessary to define the term under consideration. Federalism can be defined as a principle of political organization in which there is both a central government for a particular polity and separate governments for some or all the territorial sub-units of that polity—separate governments that can assert a claim of right against the central government. Put conversely, federalism is a system where certain powers, although not denied to government in general, are denied to the central government and granted only to the governments of some or all territorial sub-units. This definition is intentionally inclusive, probably more so than current usage.[12] It includes not

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been quoted with approval by a pro-federalist majority in United States v. Lopez, 115 S. Ct. 1624, 1626 (1995); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

11. Althouse, *supra* note 5.

12. The definition is similar to William Riker's, except that Riker seems to envision that the entire polity must be divided into sub-units. *See* WILLIAM RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 11 (1964).

only regimes that are divided entirely into sub-units with rights, but also those where only a few sub-units have such rights, such as reserved lands for indigenous people in an otherwise unitary regime.[13] Similarly, the definition does not require that there need be any particular set of rights that the sub-units can assert, but only that there are some such rights.

The definition does, however, impose two restrictions that are of significance, and that are consistent with our general understanding. First, the sub-units must be territorial.[14] A nation which grants the Catholic Church an irrevocable right to control marriage law, or that grants a securities exchange an irrevocable right to control certain transactions, would not ordinarily be described as federal. Second, the territorial sub-units must be able to assert a claim of right, and not merely be given a conditional or temporary grant of power. Temporary grants represent a system of decentralization, not federalism. Every nation larger than the Vatican grants some authority to territorial sub-units; in addition, business firms often grant discretion to factory managers, and the British army grants authority to commanders in the field. But such grants do not constitute federalism; rather, they represent a policy adopted by the central decisionmaker to achieve its goals, and one that can be revoked whenever a different policy promises to be more effective.[15] In a truly federal regime, some authority resides in the sub-units that cannot be elminated by the central government.

A. *Preference-Based Arguments for Federalism*

The typical argument in favor of federalism, whether by the courts or commentators, treats it as an instrumentality for achieving some basic and presumably desirable political goals. In

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13. For examples of this approach, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 27-30 (1995); Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, 29 WORLD POLITICS 343 (1977).

14. *See* RAMESH D. DIKSHIT, THE POLITICAL GEOGRAPHY OF FEDERALISM (1975); IVO D. DUSHACEK, COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS (1970); CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 188-227 (4th ed. 1968); WILLIAM S. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE (1956).

15. For a fuller explanation of this point, see Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

Gregory v. Ashcroft,[16] Justice O'Connor asserted that federalism "increases opportunity for citizen involvement in democratic processes[,] . . . allows for more innovation and experimentation in government[,] . . . makes government more responsive by putting states in competition for a mobile citizenry," and secures the promises of liberty.[17] These are presumably empirical claims that could be proven or disproven by ordinary social science evidence. They belong to the realm that Weber identified as instrumental, or means-ends rationality.[18] Federalism, Justice O'Connor claims, is a valuable, indeed essential mechanism for achieving the goals that she identifies.[19]

Both the validity and coherence of these claims are open to serious question. On an empirical basis, it has often been the national government, not state governments, that has encouraged citizen participation and programmatic experimentation.[20] And it requires a rather extraordinary level of political chauvinism to assert that the United States is demonstrably more protective of human liberty than unitary regimes such as Sweden or the United Kingdom. There is, however, an even more basic problem with instrumental arguments in favor of federalism: the value of an instrumentality necessarily depends upon the goal it is intended to achieve. This is not necessarily a sufficient condition for deciding that the instrumentality is desirable—an instrumentality that achieves its intended goals may nonetheless contravene other goals or values. But it is clearly a necessary

16. 501 U.S. 452 (1991).

17. *Id.* at 458.

18. MAX WEBER, ECONOMY AND SOCIETY 24-26 (Guenther Roth & Claus Wittich, eds. 1978).

19. *Gregory*, 501 U.S. at 458.

20. The most crucial right of participation in Western democracy is voting. Not only was the Voting Rights Act of 1964, 42 U.S.C. § 1973 (1988), a federal statute, but its specific purpose was to prevent the states from denying minorities the right to vote, a policy which many of them had consistently pursued. Voting rights legislation had been enacted after the Civil War, see Enforcement Act of 1870, 16 Stat. 140, but it was repealed in legislation that was explicitly justified in the name of federalism. Act of Feb. 8, 1894, ch. 25, 28 Stat. 36.

The most extensive and sustained effort to enable community groups within incorporated cities to participate in regulatory and benefits-distribution programs was the federal War on Poverty. *See, e.g.*, JOEL F. HANDLER, REFORMING THE POOR: WELFARE POLICY, FEDERALISM AND MORALITY (1972); FRANCES F. PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 248-84 (1971); JAMES L. SUNDQUIST & DAVID W. DAVIS, MAKING FEDERALISM WORK 32-33 (1969); DAVID ZEREFSKY, PRESIDENT JOHNSON'S WAR ON POVERTY (1986).

condition. If one argues that federalism is the best way to achieve some political goal, the goal itself is a necessary premise of the argument.

Political goals are based on human preferences; they represent a choice about the kind of life people want to lead and the kind of regime they want to inhabit.[21] Federalism is so fundamental because it determines the manner in which human preferences are aggregated. Politics, of course, is essentially a matter of aggregate behavior, and democratic politics involves a particular way of aggregating individual preferences. Thus, it is impossible to favor federalism on the ground that it will best achieve some previously identified political goal. How can one know what goal has been chosen until one can identify the entity that is making the choice? In the American context, the two alternatives are a federalist state, with fifty mutually exclusive entities and one overarching entity, or a unitary state with a single decision-making entity. If the nation is conceived in federalist terms, then there are necessarily some goals that the fifty states are entitled to establish and that the national government cannot contravene. But if the nation is unitary, all goals will be set by the national government, and any state policy is subject to criticism and reversal if it violates those nationally-established goals.[22] In other words, the decision about the federalist or national structure of government is anterior to any choice of goals by a governmental decisionmaking process.

This is true even for the most frequently stated claim that federalism is designed to "protect our fundamental liberties."[23] How does one know what "our" fundamental liberties are, or that "we" want them protected, without knowing who "we" are—that

21. This does not necessarily mean that they are irrational, or beyond the realm of public discourse. Weber suggested, *supra* note 18, at 24-26, and Jurgen Habermas has elaborated a separate mode of rationality, called values rationality, that would apply to the selection of goals. JURGEN HABERMAS, THE THEORY OF COMMUNICATE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (VOL. I) 243-337 (Thomas McCarthy, trans. 1984). But the process they envision is as dependent upon human preferences as any non-rational, or emotively-based, choice.

22. As Calvin Massey puts it: "If constitutional guarantees of individual liberty derive from an incident of *national* citizenship, then the very idea of national citizenship is endangered when regional units of the federal whole are empowered to redefine the incidents of citizenship." Calvin Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1299.

23. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

is, one or fifty one political entities. The response that might first be offered is that everyone wants liberty. While that may be largely true at this particular historical moment, it is certainly not a general answer. At one time, for example, nearly half the states, as political entities, asserted that their black residents did not want liberty and, indeed, were much better off without it, while the national government and the remainder of the states asserted that every adult person should have liberty. Whether "we" referred to one entity or—at that time—thirty-three, clearly made a major difference. Even today, although everyone might favor liberty as a general principle, specific applications of that sentiment will differ markedly. Perhaps there are some issues, or applications, on which everyone within the United States agrees, but this only suggests that we can ignore the crucial questions raised by the federalism issue in those cases where it does make a difference.

Nor can this argument be side-stepped by asserting that everyone agrees on a generalized decisionmaking process, such as democracy or preference maximizing, and that this process can then be used to decide upon desired goals. Such generalized decisionmaking processes, like particular political goals, and like particular strategies for achieving those goals, are equally the product of political choice. Once again, it is necessary to identify the entity making the choice before that choice is made; the fact that most people in the present United States want such a government tells us nothing, because the particular form that democracy or preference maximizing assumes will depend upon political choices. Moreover, the reason that most people want the same thing may be because they have lived in a single, unified polity for many years, and that polity, or their participation in it, has shaped their political attitudes.

Some political economists claim that federalism is a better way to satisfy individual preferences than a unitary regime.[24] The problem, again, is that there is no way to select preference satisfaction as a political goal without specifying the entity that would choose that goal. Suppose that such an entity exists, that it is a majority-rule democracy, and that it has in fact chosen

24. *See* VINCENT OSTROM, THE MEANING OF AMERICAN FEDERALISM (1991); PAUL PETERSON, THE PRICE OF FEDERALISM (1995); Charles M. Tiebout, *A Pure Theory of Local Expenditures,* 64 J. POL. ECON. 416 (1956); Gordon Tullock, *Federalism: Problems of Scale,* 6 PUB. CHOICE 19 (1969); Bednar & Eskridge, *supra* note 5.

preference satisfaction as an important political goal. Presumably, it would distribute administrative authority in order to achieve the preference-maximizing effects that the majority of its citizens deem beneficial. What it would not do, however, is distribute authority to allow these administrative sub-units to take actions that the majority regard as immoral, such as enslaving, torturing, or segregating some of their residents. The reason is that the majority of the political entity in question, using its power of majority rule, has affirmatively decided that no citizen should be treated in this fashion. Federalism, which allows such treatment by giving sub-units indefeasible rights, is thus an unlikely choice for a political entity.

This argument, being a general one, does not depend on the specific character of the goals that the centralized decisionmaker is trying to achieve. If one begins with a goal, whether it is efficiency, or fairness, or preference maximizing, an argument that some particular political structure will best achieve that goal is necessarily instrumental to that goal. From the perspective of a centralized decisionmaker, no instrumental means of achieving its goal needs to recognize independent, definitive rights in its sub-units. Indeed, granting those rights necessarily endangers the goal, because the sub-units may not act as predicted, or subsequent alterations in circumstances may recommend a different instrumentality. Do "we" as a single decisionmaking entity want greater public participation in foreign policymaking, rather than having our foreign policy run from "inside the Beltway"? If so, by all means, let us decentralize decisionmaking so that the people can have a greater voice; let us transfer the process down to the state level, with each state being responsible for relations with one large nation, one middle-sized nation, and two little nations. Suppose, however, that the result is an incoherent foreign policy that actually gives people less of a voice in truly important decisions, or that that some states, having been given this authority, exclude public participation by delegating foreign policy decisions to a recondite cabal, or by providing that elections for state officials are to be held once every twenty years. Wouldn't "we," a single decisionmaking entity, so concerned about public participation, want to seek some other instrumentality to achieve our goal or be able to intervene and redirect the errant states?

The considerations about the nature of collective decisionmaking suggest that a certain amount of caution is

reuqired when referring to the actions of political entities. It is certainly convenient to view the aggregated preferences that represent a government as creating a collective actor. This involves a certain amount of anthropomorphism, but it need not lead to the mystical and ultimately dangerous general will theories of Rousseau[25] and Hegel.[26] Rather, it can be translated into a set of identifiable motivations of real world individuals. First, it represents the willingness of people to obey the instructions that the government issues. Second, it represents the decisionmaking process by which the leaders of that government take action. The anthropomorphic discourse into which we so effortlessly lapse—"the United States expressed its disapproval," "France has nationalized its railroads," can be regarded as a heuristic for these more complex relationships.

Any mode of governance, whether be it monarchy, autocracy, totalitarianism, or democracy, must be grounded in one of these collective entities. Individuals can have a preference for one mode or another, and they can articulate theories that explain or support one mode or another, but none of these modes can be implemented without a political actor—the collective entity of government. It is a particular entity that chooses a particular mode of governance. While this locution is essentially a heuristic for the phenomena of individual obedience and joint decisionmaking, it nonetheless reveals an essential feature of these processes. The entity exists prior to, and is necessary for, determining the mode of governance. In other words, there is no way to determine what mode of governance is being chosen until one identifies the entity that is making the choice.

Useful as the heuristic of collective entities may be, however, it is important to remember that these entities are socially constructed, not independently existing, . and derive their attributes from the process of creation. Consider, for example, the increasingly popular idea that the federal government should not "commandeer" state governments to implement federal programs.[27] This has an intuitive appeal, since most people do

25. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Willmoore Kendall, trans. 1954).

26. G.W.F. HEGEL, PHILOSOPHY OF RIGHT §§ 257-271 (T.M. Knox trans. 1952).

27. *See* Printz v. United States, 65 U.S.L.W. 4731 (U.S. June 27, 1997); New York v. United States, 505 U.S. 144 (1992); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); D. Bruce La Pierre, *Political Accountability in the*

not want to be commanded, to say nothing of commandeered, but it depends on the idea that the states exist as separate loci of public loyalty, or separate collective entities, which is precisely the point at issue. If they have no such existence, then Congress is simply administering its program, not commandeering something. If Congress assigns a new task to a regulatory agency—if it orders the Federal Reserve Board, for example, to implement the Truth-in-Lending Act[28]—the process would not be described as commandeering, but merely as ordinary implementation. The reason is that the Federal Reserve is regarded as part of the government, not a separate political entity.[29]

In short, the concept of a political collectivity possesses a very important political reality. It is a locus of the loyalties of real individuals; once those individual loyalties generate actions that create a set of institutions for the collectivity, it becomes a source of political authority as well. In fact, it will typically be the most important source, for the political preferences that groups of people share are most readily expressed through institutions, and, in fact, are typically not expressed in any other fashion except during periods of extraordinary crisis. At the same time, it must always be remembered that political collectivities are socially constructed. If people cease being loyal to them, or cease expressing their views through them, they cease to exist as separate entities. Of course, the institutions that have been created during their existence may remain, but those institutions no longer represent a political collectivity. That does not make them unreal; most institutions, including General Motors, the ACLU, the Presbyterian Church in America, the Society for American Baseball Research, and the Smashing Pumpkins Fan Club, are perfectly real. They represent various views or

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National Political Process—the Alternative to Judicial Review of Federalism Issues, 80 NW. U. L. REV. 572 (1985); Saikrishna, Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Bednar & Eskridge, *supra* note 5, at 1473-75.

28. 15 U.S.C. § 1607 (1988). It was weird to assign the enforcement of a consumer protection statute to a central bank, but no one suggested that the Federal Reserve had a right to refuse the assignment.

29. The question that would then arise, in the case of assigning implementation to an agency or a state, is how effective such assignments are in achieving the purposes of the legislation. There may be reasons to believe that assigning implementation to a geographically defined sub-unit controlled by elected officials would be less effective, but that might not always be the case. *See* Joshua Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997).

interests, but they do not constitute political collectivities. That is why observors, ever since DeTocqueville, have noted that the vast array of institutions in America do not have any direct relationship to federalism.[30]

B. Preference Transcending Arguments

If preference-based arguments cannot justify federalism, perhaps federalism can be justified by appealing to sources that transcend individual preferences, such as natural rights or positive law. Justice Powell's reference to "our fundamental liberties"[31] may be suggesting that people have a set of natural rights, independent of any political association, and that these rights are best protected by a federal form of government. Once again, this argument is in instrumental form and is open to serious empirical doubt. But it does seem to escape the difficulty of the other instrumental arguments because the goal it serves is not derived from aggregating human preferences. Thus, it appears to avoid the requirement that the question of federalism be resolved before the instrumental argument is reached. Such a natural rights argument, however, is not one that most people find particularly convincing these days. The current view is that rights are socially constructed, that they are the product of a particular historical experience. That does not derogate in any way from the claim that rights are extremely important to contemporary Americans; it is precisely one's historical experience that determines what one regards as important. But it does avoid implausible claims that rights were equally important to medieval Europeans or the ancient Maya.

Even if one is prepared to accept a natural rights theory, however, it cannot resolve the fundamental question of federalism. The reason is that natural rights, while they do not depend on individual choice, do depend upon individual knowledge or reason. To begin with, these rights, as presently conceived, necessarily reside in the individual.[32] Perhaps people have a natural right to maximize their abilities, or to speak

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30. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (George Lawrence trans. 1969).

31. *See supra* note 9 and accompanying text.

32. John Finnis, for example, derives his concept of natural rights from the individual's desire to lead a good life. *See* NATURAL LAW AND NATURAL RIGHTS (1980); *see also* HEGEL, *supra* note 26, §§ 1-47.

freely, or to have illegally-obtained evidence of their crimes excluded from determinations of their guilt. Perhaps such a theory can be derived from the constitutive understandings of people's culture or even from objective moral truths.[33] But natural law arguments for the rights or powers of collective entities are out of fashion these days. In any event, such arguments relate to the nation as a whole; there is no theory of natural rights that vests such rights in particular political subunits, such as American states. While one could stipulate such rights, no convincing argument can be constructed on that basis.[34] All natural rights theories with any current credibility involve the natural rights of individuals.

Political entities, once again, are aggregations of individuals. Even if individuals have natural rights, and a desirable government is one which secures or maximizes such rights, it is still necessary to determine which group of people is selecting the government. No abstract argument about the most promising form of government will do, because there is no way to resolve this argument without identifying the decisionmaking process that will determine the mode of governance. In other words, although the nature of a desirable regime does not depend directly upon human choice according to natural rights theory, human choice is necessary to select the kind of government that will implement that regime in the most effective fashion.

Consider, for example, the currently popular idea that small governments, ones that are close to the people,[35] protect human rights more assiduously than large ones, and ignore the fact that it is empirically false, irretrievably old-fashioned, and internally incoherent.[36] Presumably, this idea asserts that a group of one

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33. Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061; Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992).

34. It is a weakness of natural rights theory that there is no obvious restriction on what can be stipulated.

35. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991); ROBERT DAHL & EDWARD TUFTE, SIZE AND DEMOCRACY (1973); STEPHEN ELKIN, CITY AND REGIME IN THE AMERICAN REPUBLIC (1987); JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Clayton Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

36. *See* BENJAMIN BARBER, STRONG DEMOCRACY 260-98 (1984); THOMAS R. DYE, POLITICS IN STATES AND LOCAL COMMUNITIES (7th ed. 1991); NICHOLAS HENRY, GOVERNING AT THE GRASSROOTS (2d ed. 1984); BARRY D. KARL, THE UNEASY STATE (1983); RICHARD LEACH, AMERICAN FEDERALISM (1970); ROSCOE C. MARTIN, THE

hundred million people would be better off with ten separate polities of equal size than one single polity. But how would one know? One could ask these hundred million people, but in order to obtain some politically relevant response, one would need to aggregate their individual responses in some fashion. The choice between one entity and ten, of course, determines precisely that process of aggregation. Moreover, how would these people know which configuration was more protective of natural liberty without the opportunity to see both alternatives in operation? The preferable format cannot simply be declared in advance, for then one is asserting that people have an inherent preference for small polities, not that small polities implement fundamental liberties. In order to see one or the other configuration in operation, as part of a real, historically existing policy, the people must first choose which configuration they want. Thus, to effectuate individual decisionmaking, in any real sense, one must have both a principle of aggregation and an historical experience of living in an aggregation of some particular sort. Federalism determines what these aggregations are, it cannot be determined by them.

Perhaps one might attempt to argue that the political regime itself can be constructed independently of human preferences, that there is some objective or at least generalized theory of politics that can indicate, on the basis of reason, which form of government will best protect natural liberty. However, one would also need a number of rather remarkable additional beliefs in order to decide the question of federalism in this manner. First, one would need to believe that this theory actually determined the national or federal structure of government, rather than making such a question contingent upon people's preferences. This is not the standard natural rights argument; according to the standard argument, it is the rights themselves that can be discerned by reason, not the mechanism by which those rights are implemented. Second, one would need to believe that this theory was capable of being implemented in some fashion that did not involve the aggregation of preferences. One way of doing so would be by force, but that assumes that the category of natural rights did not include the right of political choice.

CITIES AND THE FEDERAL SYSTEM (1977); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*," 90 COLUM. L. REV. 346 (1990).

Another way would be by means of individual, non-institutionally located conversations. Habermas may have envisioned such a process at one point, but his more recent book locates the conversations or communications he favors in a richly described institutional context.[37] This, once again, requires an anterior decision about the contours of the polity and, thus, about the issue of federalism.

In addition to natural law arguments that avoid relying upon human preference, there are also positive law arguments that possess this attribute. Some of these involve autocracy,[38] which, aside from being rather inconsistent with the current governmental system in most Western nations, does not provide a basis for federalism. The more current positive law arguments are constitutional. To be sure, the American Constitution was originally adopted on the basis of aggregated preferences, but this need not be the case. In the ancient world, constitutions were seen as having been formulated by a divinely inspired legislator,[39] and the English constitution is regarded as the product of tradition.[40] Regardless of their origin, constitutions can be viewed as establishing a set of general laws that all members of the jurisdiction obey, as a matter of common understanding rather than explicit political choice. If that constitution embodies the principle of federalism, then federalism would seem to be established independently of current preferences. That is indeed one of the arguments that the Court and the commentators have employed: federalism, they argue, represents the intent of the Constitution's Framers, or the best interpretation of the constitutional text.[41]

The difficulty with this argument is that federalism is too fundamental to be treated as a provision in a constitution. The

37. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg, trans. 1996).

38. *See, e.g.*, THOMAS HOBBES, LEVIATHAN (1651); Karl Marx, *Toward the Critique of Hegel's Philosophy of Right, in* MARX AND ENGELS, BASIC WRITINGS ON POLITICS AND PHILOSOPHY 262 (Lewis Feuer, ed. 1959); Karl Marx & Friedrich Engels, *Manifesto of the Communist Party, in id.* at 1.

39. ARISTOTLE, POLITICS II, IX & XII; PLUTARCH, PARALLEL LIVES, Lycurgus, Solon.

40. *See* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1961); J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (1957).

41. RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987); Raoul Berger, *Federalism: The Founders' Design—A Response to Michael McConnell,* 57 GEO. WASH. L. REV. 51 (1988).

right to speak, the organization of the legislature, judicial review, even the democratic or nondemocratic nature of the government in its entirety can all be regarded as products of a constitutional ordering. But federalism addresses the question of membership in the political community that is governed by the constitution in question. Clearly, if one is not a member of that community, its constitution has no positive law force. Similarly, if one regards one's community as a federal one, where the national constitution extends only to certain issues, and a separate and equally valid ordering, constitutional or otherwise, governs the remaining issues, then the national constitution has no power to establish or eliminate this federal structure.[42]

This is quite different from a disagreement within a political community about the meaning of the constitution, even if that disagreement involves the proper scope of government. Suppose, for example, the government of a particular constitutional regime decides to close down some newspapers that it regards as seditious, and many citizens object that the constitution entirely denies the government that power. The debate, however intense, is occurring within a single, agreed-upon political community that, by hypothesis, accepts the constitution as binding. There is no other political ordering to which the citizens can appeal; their claim, rather, is that their own political ordering forbids the government's actions. If the citizens are sufficiently incensed about those actions, they might rebel or emigrate, but they would still be fighting or leaving a particular political entity with established and acknowledged boundaries.

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42. A number of writers have depicted a constitution as a means by which a group of people disable themselves from taking future actions, in the heat of a future political moment, which they currently believe will be disadvantageous. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 10-11 (2d ed. 1988) (pigeons are unable to resist an immediate but less satisfactory gratification, but are able to make a choice that removes the immediate gratification in favor of the later, but more satisfactory, one); Jonathan Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory,* 74 VA. L. REV. 471 (1988). The point, however, is that the people or pigeons are restraining themselves, not others. Of course, those bound by the constitution will not be the same individuals, given the passage of time, and they will be a totally different group of individuals after about fifty years. The sense of selfhood on which all these accounts depend is necessarily derived from their similar territorial, institutional, and ideological boundaries. *See* H.L.A. HART, THE CONCEPT OF LAW 6-7 (1961).

Suppose, instead, that the debate involves a question of federalism. The national government decides to close a particular private factory that it regards as a health hazard, and many citizens object that the constitution denies that government the right to do so, on federalism grounds. Here, the claim is that there exists a different government that has jurisdiction over the factory. The citizens are not arguing about the meaning of the national constitution from within that single polity, but rather about the boundary of the regime that the national constitution has established. They are indeed asserting that the national government's interpretation of its own constitution is incorrect, since that constitution reflects the federalist structure of the polity, but they are also asserting that there is a separate political entity, to which they belong, that has valid authority over the subject matter at issue. Such a claim cannot be resolved by interpreting the national constitution alone because there is another political entity with a countervailing claim. The choice between those conflicting claims, and the conflicting polities, is anterior to any interpretive question about each polity's particular constitution.

Another way to express the same idea is in terms of obedience to an existing constitution. Within a relatively brief period of time, by constitutional standards, all the drafters and enactors of the document will be dead; the question that arises among their living descendants is whether there is any reason to obey the strictures of these departed founders. The usual answers to this question invoke tradition, commitment, the desire for political stability, respect for one's history, and so forth. All these reasons, however, are premised on a sense of membership in the polity established or defined by the constitution. If one does not feel that one belongs to that polity, there is no internal reason to respect its constitution. Once again, federalism is more basic than constitutionalism because it involves precisely this sense of commitment to a polity. The constitution cannot decide issues of federalism because federalist issues determine the moral authority of the constitution.

II. FEDERALISM ITSELF

To summarize thus far, federalism involves the fundamental issue of the way in which individuals aggregate themselves into political entities. No instrumental argument can determine its

desirability, because instrumentalities can only be judged in relation to the goals they serve, and goals are choices that depend upon the nature of the political entity that is exercising the choice. Nor can federalism be determined by political principles that do not depend on preference, such as natural rights or a constitutional ordering. Natural rights must still be discerned and implemented by human beings, those human beings must be aggregated in some way to carry out that process, and federalism determines the manner of aggregation. Similarly, a constitution may embody the political ordering for a particular group of people, but federalism determines the boundaries of the group, and the jurisdictional contours of its ordering. Most political issues involve the decisions that political entities make, but federalism is a much more fundamental issue; it goes to the basic nature and composition of those entities that are making the decisions.

A. The Essence of Federalism

How then can we determine whether federalism is desirable? The answer necessarily involves the way that people choose to aggregate themselves into political entities; in other words, it involves the problem of legitimacy. This is an extremely tulgy topic, one that has been bouncing around Western civilization for at least twenty-five hundred years. Given the fundamentality of federalism, however, it cannot be avoided.

The most common definition of legitimacy is, in Rodney Barker's formulation, "precisely the belief in the rightfulness of a state, in its authority to issue commands, so that those commands are obeyed not simply out of fear or self interest, but because they are believed in some sense to have moral authority, because subjects believe they ought to obey."[43] As Barker notes, this definition has both a descriptive and a normative interpretation. To make it less demanding, and to separate its descriptive from its normative elements, it can be revised to say that the state's commands are obeyed not only out of fear or self interest, but also because they are regarded as possessing at least some modicum of moral authority. Such a formulation

43. RODNEY BARKER, POLITICAL LEGITIMACY AND THE STATE 11 (1990). *See generally* LEGITIMACY AND THE STATE (William Connolly, ed. 1984); JOHN SCHAAR, LEGITIMACY IN THE MODERN STATE (1981).

excludes situations of outright compulsion—H.L.A. Hart's gunman writ large[44]—but treats most functioning states as legitimate. This appears to be a descriptive account that does not incorporate any controversial value judgments into the definition.

For simplicity, consideration may be limited to a modern, industrial, administrative state such as our own. While this is not a particularly restrictive condition for practical purposes, it does have some significant implications. The state's industrial character means that work is highly specialized, and that virtually all people depend upon others for their brute survival, to say nothing of the high quality of life to which they have become accustomed. Its administrative character means that government provides a vast range of services through complex, elaborately-structured organizations; it maintains civil peace and order, operates schools, hospitals, and parks, fights fires and responds to natural disasters, provides financial resources to the poor, the handicapped, and the elderly, monitors the safety of food, shelter, and consumer products, and supports a variety of cultural and scientific enterprises. The citizens of such a society are born into its midst and reach their adult years within its all-encompassing framework.[45] Under ordinary circumstances, there is no point at which they make a choice about the kind of regime in which they want to live. They do, of course, make a variety of choices within the context of that regime; if they live in a democracy, they will have the opportunity to choose their leaders, and if they live in California, they may even get to choose their tax rate. But they do not typically make any explicit choices about "the basic structure" of their political regime.[46]

Thus, the nature of modern society strongly suggests that the issue of a political entity's legitimacy is difficult to explore by focusing on individual choice. As a descriptive matter, such choices are never made. As a normative matter, the idea of choosing one's political context is sufficiently remote from ordinary life to render pragmatic or intuitionist arguments problematic. This suggests that social contract theories are unlikely to provide much insight into the legitimacy of modern, industrial, administrative states.[47] But it also suggests that

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44. HART, *supra* note 42.
45. JOHN RAWLS, POLITICAL LIBERALISM 40-43 (1993).
46. *Id.* at 11-12, 257-88.
47. *E.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690); JOHN RAWLS, A

positivist accounts will be equally unhelpful.[48] Such accounts are based upon the state's ability to issue commands backed by force, but individuals in the modern state are so dependent on the state, and in such a variety of complex ways, that it is really impossible to distinguish command from inducement, or force from social or economic advantages and disadvantages. Thus, an individual's decision to obey the state is not based on the state's use of force, but on a range of conscious and unconscious behaviors as broad as social behavior in its entirety. Nor does H.L.A. Hart's refurbishment of positivism resolve this problem.[49] There is really no recognizable rule of recognition in modern society; rather, there is a complex set of practices that are too varied and diffuse to be captured by the concept of a rule.

Weber suggests that the legitimacy of a political order is often a matter of habit, not choice,[50] but even this seems to understate the situation. In modern society, the state's existence, authority and legitimacy will generally be a given in the individual's life situation. It will be part of what Husserl described as the taken-for-granted nature of reality,[51] "the world in which I find myself and which is also my world-about-me."[52]

THEORY OF JUSTICE (1971); HOBBES, *supra* note 26. In his later work, Rawls concedes that his revision of social contract theory is a heuristic, "a device of representation." RAWLS, *supra*, at 24-28. Thus, he abandons any strong claim to its being a descriptive account of political legitimacy. As a normative account, Rawls' social contract theory is more relevant, but a detailed discussion of it is beyond the scope of this Article. The point being made here is simply that Rawls imagines a process that is not intuitively accessible to us because it is not part of our ordinary political experience. In fact, Rawls concedes this, because he constructs a new conceptual methodology, which he calls "reflective equilibrium," *See id.* at 48-52.

48. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945); HANS KELSEN, PURE THEORY OF LAW (1967); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEMS (2d ed. 1980).

49. HART, *supra* note 42.

50. WEBER, *supra* note 18, at 261-67.

51. EDMUND HUSSERL, THE CRISIS OF THE EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY 103-11 (David Carr trans. 1970); EDMUND HUSSERL, IDEAS 91-96 (W.R. Boyce Gibson, Trans. 1962) [hereinafter IDEAS].

52. IDEAS, *supra* note 51, at 93 (emphasis omitted).

> Through sight, touch, hearing, etc., in the different ways of sensory perception, corporeal things somehow spatially distributed are *for me simply there*, in verbal or figurative sense "present," whether or not I pay them special attention by busying myself with them, considering, thinking, feeling, willing. . . . But it is not necessary that they and other objects likewise should be present precisely in my *field of perception*. For me, real objects are there, definite, more or less familiar, agreeing with what is actually perceived without being themselves perceived or even

Obviously, it is not as securely fixed in one's sense of the world, not as taken-for-granted, as sense experience, which is what Husserl was discussing. But, if something is pervasive and unquestioned, as is the existence of the modern state under ordinary circumstances, it will be perceived as part of that all-encompassing world nonetheless. Thus, the state becomes legitimate for its citizens simply because it is there, simply because of its brute, comprehensive existence. People are born into it, they live in it, they depend on its continuation, and they make their political choices within its context.

The taken-for-granted nature of the modern state suggests a figure-ground reversal for the issue of political legitimacy. The question for analysis is not what makes the state legitimate, but what makes it illegitimate.[53] Under what circumstances does this comprehensive political ordering become problematic for people, so that they begin to contemplate its dissolution or its transformation? Under what circumstance do we "bracket" the state, to use Husserl's term,[54] ceasing to treat it as a taken-for-granted political context, and regard it as a specific set of political choices that are subject to change. Clearly, this is a matter of great complexity that demands both extensive empirical data and a reliable model of political behavior, and that implicates many of the most crucial questions of public morality.

Fortunately, the inquiry can be narrowed considerably for purposes of this discussion. As a matter of pure logic, or numerology, one can distinguish between challenges to the political order raised by individuals, challenges raised by groups, and challenges raised by the populace as a whole. The first category, which presents many of the normative questions in

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intuitively present.

Id. at 91. For a political theory built on the state's taken-for-granted character, see BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

53. Because the concept of habit is being used to provide a perspective on the issue of legitimacy, not as a complete account of actual motivations, it is not subject to Hart's objection that rule following lacks the "unreflective, effortless, engrained character of a habit." HART, *supra* note 42, at 51. It also seems true, however, that Hart does not fully answer Weber. Habits, though generally unreflexive, can be "disobeyed" just as laws can be, if circumstances warrant and the sanction for disobedience is small. Most people have a habit of washing their face and brushing their teeth in the morning, but they can disobey it if they oversleep. In addition, a willingness to break some laws does not contradict the idea that general obedience to the state, as a comprehensive political ordering, may be habitual.

54. IDEAS, *supra* note 51, at 96-100.

their most direct and intractable form, can be safely ignored for present purposes. Federalism involves claims of right by government sub-units; no one really suggests it as a response to challenges by individuals.[55] The third category—challenges to the political ordering by the populace in its entirety—may be ignored for similar reasons. While a generalized challenge to a regime may involve questions of federalism, it will only do so when the populace is divided into identifiable groups, and thus falls into the second category as well.

It is in this second, or intermediate, category, where challenges to a political regime will involve questions of federalism. As the existing political ordering becomes problematic for people, various groups may question their membership in the polity, their rights within the polity, or the particular configuration that the polity assumes. These are the issues that the federalist mode of political organization can address.

A notable illustration of the distinction between federalist and nonfederalist crises of legitimacy is provided by the recent revolutions in the formerly Communist nations of Europe. All these nations experienced crises of legitimacy and ultimately rejected their prevailing regimes. In at least two of them, the crisis not only involved the government of the regime, but also the composition of the polity. These nations, namely the Soviet Union and Czechoslovakia, contained separate groups, groups that took advantage of the general breakdown of the political ordering to advance claims of autonomy.[56] But in Poland and Hungary, which experienced initially similar revolutions, the question of federalism did not seriously arise. There were no major groups within these actions demanding that their separate identity be recognized. The Poles still regarded themselves as

55. Rawls, for example, specifically links his revised social contract theory to the process of individual reflection. *See* RAWLS, *supra* note 47. While Michael Sandel is simply wrong in suggesting that Rawls is hypothesizing imaginary and de-culturated human beings as his decisionmakers, see MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982), it is certainly true that Rawls is hypothesizing individual human beings, not collectivities.

56. *See, e.g.,* Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511 (1991); Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299 (1993); Jon Elster, Note, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 451-52 (1991); Holly A. Osterland, Note, *National Self-Determination and Secession: The Slovak Model*, 25 CASE WESTERN RES. J. INT'L L. 655 (1993).

Poles, and the Hungarians as Hungarian, that is, as members of a single polity, even after its existing government collapsed and was replaced by an entirely different one.[57]

Federalism, therefore, becomes an issue only when the challenge to the existing order is raised by identifiable sub-groups within the polity. If a polity is composed, in its entirety, of recognizable sub-groups, a crisis of legitimacy may cause that polity to break into its component parts, as the Soviet Union and Czechoslovakia did. If the recognizable sub-groups represent a minority, if one sub-group dominates the society or controls the government, or if there are differing views among the groups, there may well be a conflict between those favoring secession and those favoring the continued unity of the state. The usual way to resolve such a conflict is war, and wars of secession are among the most vicious in the lugubrious history of human conflict. The majority or dominant group is likely to think that the rebelling group will ultimately be more tractable if there are fewer of them, perhaps a great many fewer, while the rebelling group is likely to become more desperate to secede the more they realize that if secession fails, they will be ruled by those who are so assiduously trying to reduce their numbers.

Federalism, in essence, is a political alternative to secession.[58] It is a way to compromise between those favoring a unified state and those favoring the dissolution of the state or the separation of some portion of that state.[59] Its essential principle, as defined above, is that sub-units of the state possess certain claims of right against the central government. Thus, the residents of these sub-units have partial autonomy, that is, some of the autonomy that they would have possessed as a separate state. On the other hand, the central state has retained a certain level of authority over its entire territory that enables it to implement

57. *See* Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595 (1991); *see also id.* at 616-19 (describing Polish preference for proportional representation); Elster, *supra* note 56, at 450-51. As Elster points out, however, there are large Hungarian minorities in other Eastern European nations. Elster, *supra* note 56, at 451.

58. On the political role of secession, see ALLEN BUCHANAN, SECESSION: THE LEGITIMACY OF POLITICAL DIVORCE (1991); Allen Buchanan, *Toward a Theory of Secession*, 101 ETHICS 322 (1991); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991).

59. Sunstein, *supra* note 58, at 664-65.

some, perhaps many, of the policies that its majority or dominant group desires.[60]

This compromise means that in a federalist regime, some of the people or all the people within that regime will be connected with two different collective entities. They will be inclined to obey both the central government and the government of the particular sub-unit to which they belong. For federalism to be an operative mode of governance, rather than simply an unsatisfied desire, this duality requires that the sub-units must possess a government of their own, a means of implementing political choices. A government, after all, is the only mechanism by which political decisions can be implemented through regular or legitimate means. For federalism to function as an alternative to secession, the sub-units must possess an independent government that can implement the autonomy rights that the sub-units have been granted.

An independent government is one that is chosen by the members of the sub-unit rather than by the central government. There is, of course, no need for these sub-unit governments to be democracies; the only requirement for federalism is that there be some mechanism of selecting leaders that is controlled by those within the sub-unit. The sub-unit's government, for example, can be a hereditary succession, as long as some agency within the sub-unit itself resolves uncertainties about that succession. If the sub-unit is a democracy, then the franchise must be restricted to the members of that sub-unit. Appointment of the sub-unit's political leaders by the central government, heredity determined by the central government, or election by the voters of the entire state are generally inconsistent with federalism because the central government is likely to control the sub-unit's government under these circumstances, and thus the sub-unit will not have any agency to operationalize its autonomy rights.

It is important to note that the converse of this observation is not necessarily valid. While a functioning federalist system

60. Hence the danger of allowing a right of secession, which Cass Sunstein thoughtfully explores. *Id.* Such a right gives sub-units excessive bargaining power, and thus amplifies a number of morally dubious claims, such as economic self-interest or long-past acquisition of the sub-unit's territory. It thus places excessive pressure on the national element of the compromise in Sunstein's view. Of course, as Sunstein points out, the threat of secession only exercises these effects if it is credible, *id.* at 650; it is credible only if the sub-units have some political reality, some ability to command the loyalty of their residents.

probably demands that the sub-units have governments, the fact that sub-units have governments does not mean that the nation is federalist. Territorial decentralization also requires sub-unit governments, and, indeed, every reasonably-sized nation makes use of such governments for a variety of purposes. The nation is only federalist if these sub-units serve as loci of political loyalty and as possessors of autonomy rights. Several scholars have suggested that federalism is a political fact in the United States because the states exist, they wield important powers, and they affect the political process.[61] But all of this is true of French departments, English counties, Japanese prefectures, and other political subdivisions of unitary regimes. It is a necessary feature of managerial decentralization but does not, by itself, demand the sorts of rights claims by the sub-units that characterize the federalist systems.

B. The Features of Federalism

With the essence of federalism now identified, certain common features can be derived. These involve the allocation of authority between the center and the sub-units, the territorial nature of federalism, its moral implications, its status over time, and its place in a written constitution.

There is no necessary allocation of authority between the central government and the sub-units, in terms of either quantity or areas of authority. Obviously, if the central government has too much authority, the regime will be unitary rather than federal; if it has too little, the regime will be an alliance rather than a single state. But the strength of the federal principle can vary within those limits, and many historical examples of such variations can be found.

With respect to particular areas of authority, there are certain allocations that are likely to be typical. Foreign affairs is often reserved to the central government because of the regime's need to relate to other unitary regimes in an effective way, and because foreign policy matters will often not be salient to the conflicts within the nation that are addressed by the federalist

61. *See, e.g.*, Richard Briffault, *What About the 'Ism'? Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Daniel Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, Symposium Issue YALE L. & POL'Y REV./YALE J. ON REG. 149 (1996).

compromise.[62] Cultural matters, such as language, religion, and artistic regulation, will often belong to the sub-units' sphere of autonomy, because these subjects are likely to be the most salient to conflicts between sub-units, and least necessary for the operation of an effective national government.[63] Taxing power is likely to be divided between the two, in part because it is impossible to operate a government at any level without money, and in part because of money's inherently divisible nature; even a single resource, like a mine, produces a stream of receipts that can be divided between the national government and the governments of the sub-units. Economic regulation, because it is so varied, is also likely to be divided, but there will be a strong tendency toward centralization due to efficiency concerns, a tendency that may not be counterbalanced if economic matters are not salient to the sub-group conflict.

One necessary requirement for federalism, however, is that the sub-units that possess claims of right against the central government must have a territorial identity.[64] The reason lies in both linguistic usage and existing modes of governance. Linguistically, as discussed above when defining the subject matter of this Article, we simply do not describe grants of autonomy to geographically dispersed groups as federalism. For example, members of a minority religion may be granted the right to determine their own modes of worship by a nation with an established religion, and they may also be granted the right to control specific civil functions, such as marriage or education. But if these people are geographically dispersed, we would generally describe their rights as religious, cultural, or perhaps collective.

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62. With respect to the United States, see United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). Justice Sutherland's opinion distinguishes between internal matters, where "the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government," and foreign affairs, where the states did not possess any powers to begin with. *Curtiss-Wright Corp.*, 299 U.S. at 316 (emphasis in original). This will often be the case if the sub-unit had no prior existence as an independent nation. In more pragmatic terms, a sub-unit struggling for autonomy against a central government may establish links with foreign governments for strategic reasons, but foreign relations will typically not be a salient issue to the sub-unit's citizens in such a situation.

63. Charles Taylor, *Shared and Divergent Values, in* OPTIONS FOR A NEW CANADA 53 (Ronald Watts & D. Brown, eds. 1991); KYMLICKA, *supra* note 13; Van Dyke, *supra* note 13.

64. *See supra* notes 14-15 and accompanying text.

Will Kymlicka proposes the useful term "polyethnic."[65] In no case, however, are such rights described as federal.

In terms of governance, the general means of dividing a polity among operational sub-units is geographical. Perhaps this will change as we all advance, or meander, into cyberspace, but for the present, it remains a universal feature of governmental organization. Federalism, as a mode of governance, necessarily follows this basic principle of territoriality; thus, the sub-units that exercise some powers that belong to government in general, but which are denied to the central government, are necessarily conceived in geographic terms. A different approach would quickly deprive the term "federalism" of any particularized meaning. The recognition of human rights, such as free speech, free exercise of religion, or freedom of movement, grants decisionmaking autonomy to people, and those people are likely to belong to groups of various kinds. If such nongeographical autonomy were labeled federalism, then the term would be virtually indistinguishable from human rights. Similarly, permitting private enterprise grants decisionmaking authority to property owners, but treating this nongeographic category as federalism would make the term indistinguishable from capitalism. Under such definitions, every regime would be federal except a thoroughgoing communist totalitarianism. We would then need some other term to distinguish Switzerland from Sweden, and contemporary Spain from Spain under Franco, that is, some term to distinguish regimes which granted certain definitive rights to territorial sub-units from those that did not. It would then be the concept represented by that latter term that would be the subject of this Article.

The territorial nature of federalism, although essentially definitional, carries a major implication. It separates federalism from any established, theoretically-grounded principles of political or personal morality. Federal rights, as we understand the concept, can only be granted to territorial groups, but there is no intrinsic virtue to the possession of territory or the concentration of the group members in a delimited geographic area. It is merely a matter of political reality. Groups that are physically dispersed cannot be regarded as less worthy of protection, even if their condition is a voluntary one, because

65. KYMLICKA, *supra*, note 13, at 30-33.

there is no moral theory that regards physical dispersion, per se, as a moral defect. When groups are dispersed by political force or economic duress, their blamelessness is even more apparent. But federalism, because of its territorial nature, cannot come to the assistance of such groups.

Native Americans provide a useful example of this observation. Of the ten largest tribes in the United States at present, four—the Navaho, Sioux, Pueblo, and Apache—have managed to retain at least some portion of their ancestral territory, on which at least a significant proportion of their members can reside. The remaining six tribes—the Cherokee, Chippewa, Choctaw, Creek, Iroquois, and Lumpee—have lost virtually all their land, and their members are dispersed over areas with large non-Indian majorities.[66] Federalism provides a means of recognizing the separate identities of the first four tribes and enabling them to preserve their culture; the tribe, as a collectivity, can be granted the authority to govern certain subjects within its territorial area, such as education, crime, and land use. But it does not provide a mechanism for the six landless tribes; while members of those tribes can be granted certain special rights, the rights would need to be defined in terms of privileges or exemptions, rather than governance, and their possessors would need to be designated as members of an ethnic group, rather than residents of a defined territory. Yet the possibility of federal rights for the first four tribes, and not the other six, is surely a matter of political expediency, not moral worth; there is no real argument that the landless tribes merit less protection because the central government has treated them more harshly by taking all their land.

A second and related consideration is that a sub-unit that is granted certain autonomy rights because it is inhabited by an identifiable group will often contain minorities who are not members of that group.[67] These minorities are subject to the decisionmaking process of the majority within the sub-unit. Again, there is no moral argument that these minorities are less worthy of protection than the dominant group in the sub-unit;

66. *See* D'ARCY MCNICKLE, NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS 18, 172-73 (1973).

67. *See* Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835, 841 (1994); Martha Minow, *Pluralisms*, 21 U. CONN. L. REV. 965 (1989); KYMLICKA, *supra* note 13, at 152-72.

they are simply beyond the reach of federalism, as a political device. To be sure, all rights are subject to limitations. A human right such as free speech necessarily comes into conflict with other rights, or with practical considerations, and must yield to those countervailing concerns in certain circumstances. This does not necessarily separate these human rights from moral theory. But the problem with federalism's territoriality is of a different nature because the minorities within the sub-unit are advancing precisely the same claim for cultural autonomy as the sub-unit's majority. Their claim is being denied simply because they are dispersed, or because their numbers are too small. This distinction can be derived only from pragmatic considerations, not from moral ones.

The territorial character of federalism does not mean that it is entirely divorced from political morality; Native American tribes with reservation land,[68] and national minorities like the French Canadians who are concentrated in a specific area,[69] may be able to advance persuasive moral claims for certain rights against their central government. However, there will generally be other groups who can advance equally persuasive claims, but cannot be granted federalist rights because they have lost their land, or are dispersed throughout the nation, or constitute a minority within another minority group's territory. The only basis for distinguishing among these groups is political expediency. Although moral considerations may support some federalist claims, there is no general principle of political morality from which the scope of federalism can be derived. In other words, federalism is not by itself a moral claim, but it is a political expedient that, in certain circumstances, can satisfy, or at least respond to, such a claim.

Thus far, federalism has been discussed as a response to a crisis of legitimacy. Clearly, however, the federalist structure of

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68. *See* AUGIE FLERAS & JEAN ELLIOT, THE NATIONS WITHIN: ABORIGINAL-STATE RELATIONS IN CANADA, THE UNITED STATES, AND NEW ZEALAND (1992); Erik Jensen, *American Indian Tribes and Secession,* 29 TULSA L.J. 385 (1993); Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy,* 25 U. TOL. L. REV. 617 (1994).

69. KENNETH MCROBERTS, QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS (3d. Ed. 1988); THE MEANING AND FUTURE OF CANADIAN CITIZENSHIP (William Kaplan ed. 1993); William Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context,* 60 WASH. L. REV. 585 (1985).

the state persists through time in many cases and becomes part of the taken-for-granted nature of a modern state. The question then arises whether federalism has any dynamic features, whether it has any inherent tendencies to change its nature or its scope as time goes on. This question also implicates the relationship between federalism and a national constitution, since the purpose of a constitution is to preserve basic features of a political order into the future.

A federalist division of political authority within a particular state will remain relevant as long as the underlying political and social attitudes that led to its creation continue to exist. As long as the territorial sub-groups that have secured autonomy rights perceive themselves as separate, they are likely to insist upon the continuation of those rights. This does not mean, of course, that they will necessarily retain those rights. Federalism often results from a compromise between opposing forces; those favoring group autonomy are counterbalanced by those favoring a unitary regime. The proponents of unity, whether a dominant sub-group or a national majority, are likely to be in control of the central government, and central governments are likely to control the apparatus of force, such as the standing army or the internal police. Since the power to impose one's will on others generally acts as a continuing temptation to do so, there is likely to be an inherent tendency for the central government of federalist states to undermine or abolish the autonomy of their component entities. Thus, it cannot be said that the continued existence of separatist political attitudes leads to the continuation of federalism. What probably can be said, however, is that under these circumstances federalism continues or a crisis of legitimacy results.

Conversely, the existence of separate social identities among territorial groups within a unitary state often constitutes an ongoing demand for federalist rights. Such a demand can be the source of continuous or intermittent crises of legitimacy, such as the demands of the Catalonians against the Spanish state, or of the Irish against Great Britain. Indeed, this situation has been the source of some of the world's most vicious conflicts. On the other hand, it can also be a dimly perceived, subterranean reuse of dissatisfaction that only surfaces when the central state undergoes a crisis of legitimacy for other reasons. Between these two extremes there are a wide variety of intermediate positions, representing different group attitudes and different central

government policies. No generalization is entirely reliable. By and large, however, it is remarkable how difficult it is for people with salient differences to live comfortably with each other, particularly when those differences have a territorial dimension. The Catalonians have been part of Spain for five hundred years;[70] the Ukrainians have been part of a Moscow-ruled Russia for three hundred,[71] both far longer than the United States has existed as a nation. Yet, as soon as central authority faltered, both groups demanded independence, and the latter actually achieved it.[72] Nor can such difficulties necessarily be ascribed to glaring defects of the central states. For at least a century, Canada and Belgium have been among the most prosperous, benign, and socially just nations in the world, yet the separatist demands of their French-speaking citizens have only increased in intensity.[73]

Nonetheless, there is also a reverse phenomenon. Over time, the separate attitudes that demanded a federalist state can disappear, rendering federalism an unnecessary and irrelevant political expedient. As separate territorial groups live together in a single polity they can gradually blend through intermarriage, economic interactions, or joint participation in political life. France's absorption of Normandy in the medieval era, Brittany in the Renaissance-Reformation period, and Alsace-Lorraine in the modern era are notable examples.[74] Sometimes, the abolition of federalist rights can contribute to this process; sometimes, the

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70. *See* J.H. ELLIOTT, IMPERIAL SPAIN 1469-1716 15-24 (1963); ORIOL PI-SUNYER, NATIONALISM AND SOCIETAL INTEGRATION: A FOCUS ON CATALONIA (1983); JAIME VICENS VIVES, APPROACHES TO THE HISTORY OF SPAIN 87-95 (Joan C. Ullman, trans. 1967).

71. W.E.D. ALLEN, THE UKRAINE (1940); JOHN LAWRENCE, A HISTORY OF RUSSIA 109-115 (7th ed. 1993).

72. *See* ANDREA BONIME-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING (1987); LUBOMYR LUCIUK, WELCOME TO ABSURDISTAN: UKRAINE, THE SOVIET DISUNION, AND THE WEST (1995); Eastwood, *supra* note 56.

73. *See supra* note 69; JOHN FITZMAURICE, CRISIS AND COMPROMISE IN A PLURAL SOCIETY (1988); JOHN FITZMAURICE, THE POLITICS OF BELGIUM: A UNIQUE FEDERALISM (1996); CONFLICT AND COEXISTENCE IN BELGIUM: DYNAMICS OF A CULTURALLY DIVIDED SOCIETY (Arend Lijphart, ed., 1981).

74. *See* ROBIN BRIGGS, EARLY-MODERN FRANCE 1560-1715 (1977); JAMES COLLINS, THE STATE IN EARLY MODERN FRANCE (1995); DAVID PARKER, THE MAKING OF FRENCH ABSOLUTISM (1983). This can occur despite the continuation of local customs and even separate languages, as was the case in Brittany. *See* EUGENE WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE (1977).

process makes the abolition of federalist rights possible without a crisis of legitimacy.

A nation's reliance on federalism as an alternative to secession can be embodied in a written constitution. As such, the constitution functions as a guarantee to the territorial sub-units that their rights against the central government will be respected by that government. As previously discussed, however, such a provision does not represent an element of the constitution to be interpreted by the national polity alone, but the boundary of the constitution, to be interpreted by both the national government and the sub-units' governments, as separate political entities. Just as federalism itself lies in the middle ground between secession and unity, a federalist guarantee in a constitution lies in the middle group between a treaty and an ordinary constitutional provision.

This super-constitutional status renders a federalist guarantee in a constitution both stronger and weaker than the constitution's other provisions. It is stronger because it is enforced by political entities other than the central government. In this one case, the central government will find itself confronting another government, not a group of individuals, when disputes arise over the meaning of the constitution's terms. But a federalist provision is weaker than other provisions because it depends on the continued existence of separate political or cultural identities. Although federalism can function in support of moral principles, it is not itself a moral principle, but a political expedient. If the separate political identities that render it expedient should disappear, federalism's purpose disappears as well.[75] The guarantee is no longer being extended to a political collectivity that commands the loyalty of individuals, but simply

75. Akhil Reed Amar suggests that federalism provides a series of limitations, or checks, on national power: a legal check, based on the sub-units' ability to provide relief against national oppression; a military check, based on the sub-units' ability to use lethal force; and a political check, based on the sub-units' ability to speak on behalf of their citizens. Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 497-504 (1991). Quite apart from the obvious dangers of a military check, which Amar acknowledges, the limit on these limitations is that they depend on the existence of the sub-units as political entities, that is, entities that obtain the loyalty and commitment of a large portion of their citizenry. *Id.* at 501-02; *see also* Sunstein, *supra* note 58. Otherwise, the political check amounts to nothing, the military check can only authorize oppression of the populace by local armies, and the legal check requires nationally-recognized rights and has nothing to do with federalism.

to the institutional remnants of that collectivity. While those institutions may retain an important role in government, typically as a mechanism for decentralization, the guarantee itself, as a political compromise, becomes irrelevant, like a treaty with a nation that has ceased to exist.

III. THE IRRELEVANCE OF FEDERALISM IN THE UNITED STATES

Thus, federalism is a political expedient, a means of addressing basic tensions among groups that, in varying degrees, desire both unity and autonomy. It is often an alternative to disaggregation or secession, a means of maintaining a single nation in the face of distinct differences in social or political attitudes. As such, it is fundamental; it is not based on policy choices, natural rights, or constitutional arguments, but on the issue of political legitimacy. While it does not require any particular allocation of power, it is only applicable to territorial groups. Its value to those groups, and to the central government, will vary over time as attitudes change and as the legitimacy of the national polity increases or declines.

With these considerations in mind, it is now possible to assess the role of federalism in the United States. This is best accomplished by means of an historical survey. The conclusion that emerges is that federalism was once an important principle for regulating relations between the states and the national government, but that it has now become irrelevant in that arena. It remains relevant, however, in regulating relations between the national government and the Native American tribes that continue to possess reservation land, and between the national government and America's territorial possessions, such as American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands.

A. The Federalist Era (1776-1865)

Washington Irving begins his *History of New York* by observing that "the world in which we dwell is a huge, opaque, reflecting inanimate mass, floating in the vast ethereal ocean of infinite space."[76] While it is always tempting to begin at the beginning, the present account can begin, more modestly, with the

76. WASHINGTON IRVING, A HISTORY OF NEW YORK BY DIEDRICH KNICKERBOCKER Ch. 1 (1809).

declaration of American independence from Britain. At that time, America consisted of thirteen separate, territorially defined colonies, each one with its own administration. There were cultural differences between the royally-chartered Anglican colonies of the South, and the independently-founded dissenter colonies of the North. In addition, Pennsylvania had been originally populated by Quakers, Maryland by Catholics, New York by the Dutch, and Georgia by criminals.[77] Nonetheless, a unified set of social and political attitudes was emerging; ones that were sufficiently strong for all thirteen colonies to join together in the radical step of rebelling against their mother country, to mount a common military effort to preserve their newly-declared independence, and to establish a republic in an era when republics were still suspect and untested rarities.[78]

The countervailing factor was that the colonies had never possessed a central government, apart from the distant British government against which they were rebelling. At the time of the Revolution they had separate political apparatuses and separate political elites in place. The Continental Congress, like its predecessor Stamp Act Congress, was merely a gathering of state representatives to draft a petition to the operative central government, namely King George III and Parliament. When it effectively declared American independence—on May 10, 1776, although it would speak more definitively and eloquently in July—it did so by advising their separate states to set up new governments independent of their existing royal regimes.[79] This process obviously disrupted the colonial governments and unsettled the elites, but it did not lead to any basic change in governmental structure. The royal governors and the Tories were expelled and revolutionaries took their place; things at the capitals became a bit more disorganized and a bit rowdier, but

77. *See* CHARLES MCLEAN ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY (1934); RICHARD MIDDLETON, COLONIAL AMERICA: A HISTORY 1607-1760 (1992).

78. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160-229 (1967); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 91-124 (1969).

79. WOOD, *supra* note 78, at 131-32. *But see* SAMUEL BEER, TO MAKE A NATION 200-03 (1993). Beer argues that this instruction indicates that the Congress was creating the states, since it instructed the colonies to form state governments. In some abstract sense, that interpretation may be correct, nonetheless, the colonies, as administrative mechanisms, remained intact as they made the transition to independence.

basic governmental functions continued to be performed by thirteen, later fourteen, separate entities.[80]

Now there was a war to fight, however, and the Continental Congress, still a gathering of state delegates, went into permanent session. In 1777, it proposed the Articles of Confederation, which naturally had to be submitted to the states for enactment.[81] The Articles established a permanent legislature in which each state was represented, but no national executive or judiciary.[82] A nation had been formed—no inconsiderable achievement under the circumstances—but it was arguably much closer to an alliance of independent states than to a unitary regime.[83] It was federalist, in fact extremely federalist, with the majority of governmental powers being allocated to sub-units that possessed extensive claims of right against the central government. These sub-units not only set their own domestic policies, but established tariff barriers, raised and provisioned their own armed forces, and even maintained relations with foreign countries.[84] The powers of the Confederation Congress were limited and its concrete achievements were equivalently modest. The best known of these achievements was the elimination of the conflicting western claims that the constituent states advanced and the enactment of the Northwest Ordinance

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80. WOOD, *supra* note 78, at 132-255. The fourteenth government was Vermont. Because it once had been part of New York prior to the Revolution, it had to form an entirely new government.

81. *See* PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-87 (1983); Eric Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of The Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation,* 60 TENN. L. REV. 783, 798-801 (1993).

82. *See* JACK RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONSTITUTIONAL CONGRESS (1979); ONUF, *supra* note 81; WOOD, *supra* note 78, at 354-63.

83. WOOD, *supra* note 78, at 355 (government under the Articles of Confederation was intended to be " 'a council of nations,' similar to the plans for a christian European Union conceived of by Henry IV and the patriot Sully of France in the late sixteenth century").

84. *See* MARTIN DIAMOND, WHAT THE FRAMERS MEANT BY FEDERALISM IN AMERICAN INTERGOVERNMENTAL RELATIONS 39, 41-42 (Lawrence J. O'Toole ed., 1993); JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-89 (1916); MERRILL JENSEN, THE ARTICLES OF CONFEDERATION (1970). Edmund Kitch argues that the states were more cooperative than has been generally assumed, but does not deny that they functioned as separate entities. Edmund Kitch, *Regulation and The American Common Market, in* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9 (A. Dan Tarlock ed., 1981).

to govern in their stead.[85] This was a great success, but not much of an assertion of control over the governance structure of the existing states.

At the same time that the Northwest Ordinance was enacted, however, delegates from the states were meeting in Philadelphia to design a stronger central government. Their motivation was a felt need for unified action, a desire to avoid conflict and competition, a shared cultural tradition, and a sense of connection to each other born of their collective historical experience. Nonetheless, the delegates were representing separate political entities with their own governments in place.[86] They negotiated on behalf of the states and they did so on the assumption that those entities would remain intact.[87] Not only was there never any question of abolishing the states, there was never any question of combining or dividing states or of redrawing their existing boundaries, apart from the states' claims to remote Western lands that were being addressed by the Confederation Congress.[88] In addition, the delegates did not question that whatever agreement emerged from their deliberations would need to be ratified by some mechanism that allowed the states, as separate political entities, to indicate their assent.[89]

The Constitution clearly embodied a federal compromise. From the perspective of the thirteen entities that joined together to form the United States, federalism was a political expedient that allowed them to obtain the advantages of political unity, while retaining much of their former autonomy. In establishing an effectual national government, however, with its own political

85. *See generally* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987); THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY (1989).

86. Moreover, as Eric Freedman points out, they felt a sense of continuity with the Confederation government. Freedman, *supra* note 81.

87. CARL VAN DOREN, THE GREAT REHEARSAL 1-50 (1948); *see also* MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 1-5 (1966). The Journal states "in virtue of appointments from their respective States, sundry Deputies to the foederal-Convention appeared" and then lists the states represented (there were nine) and the representatives for each. FARRAND, *supra*, at 1. Madison also lists the delegates by states. *Id.* at 3. Yates begins: "Attended the convention of the states, at the state house in Philadelphia, when the following states were represented." *Id.* at 5. Votes were always taken by states. *See id.* at 47, 69, 72, 79, 119, 163, 213.

88. The Constitution, as promulgated, protected the integrity of states. U.S. CONST. art. IV, §§ 1, 3.

89. VAN DOREN, *supra* note 87, at 194-238.

apparatus, its own political elite, and a rapidly developing ability to obtain obedience from its citizens, the Constitution created a new collective entity. Many of the more nationalistic Framers seemed to understand that this would occur, or hoped that it would.[90] Using the anthropomorphic heuristic, one can say that this collective entity, which was able to make decisions apart from its constituent states, now had a perspective of its own.[91] From that perspective, federalism was a political expedient that enabled it to come into existence despite the fact that governmental operations had previously been carried out almost exclusively within its constituent sub-units.

Thus, the federal structure of the new nation was a political expedient from the perspective of either the states or the national government. No questions of political morality were involved. It is true that the Federalist Papers invoke the states and the federal government as counterbalancing forces that preserve personal liberty,[92] but this was merely an effort to allay anti-federalist fears by finding virtue in existing fact. In 1787 and 1788, there was a realistic possibility that the Constitution would not be ratified and the new national government would not come into existence, but there was no realistic possibility that the national government would come into existence without constituent states. Thus, while Madison touted the advantages of federalism, his only goal was to persuade people to favor the

90. *See* BEER, *supra* note 79, at 244-372; WOOD, *supra* note 78, at 519-64.

91. BRUCE ACKERMAN, WE THE PEOPLE 3-33 (1991); Daniel Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995). As Beer argues, James Wilson was the member of the founding generation who saw this process most clear, or predicted it most accurately. Wilson believed that public participation in the national government would bind people to that government; hence his support of direct elections. Underlying this belief is the more basic insight that governments flourish to the extent that they can obtain the loyalty of their citizens. BEER, *supra* note 79, at 360-77.

92. THE FEDERALIST NO. 46 (J. Madison). At this point, Madison could assert that it was "beyond doubt that the first and most natural attachment of the people will be to the governments of their respective states." Even if he did not truly believe this, it was apparently a sentiment that could be voiced without casting doubt on the sincerity of its author. John Yoo argues that the Federalist Papers also reflect the view that the Supreme Court would defend the federalist principle against Congressional usurpation. JOHN YOO, THE JUDICIAL SAFEGUARDS OF FEDERALISM (manuscript on file in Georgia State University College of Law Library). This is quite possible, to the extent that the Framers had any clear notion of judicial review, but their intent is only applicable if the states play a similar role in the modern American polity as they did in 1789.

proposed national government; he was not trying to persuade anyone to favor the continued existence of states because there was no necessity to do so. The federal structure of the new nation was not a virtue of its Constitution, or a policy of its government; it was a pre-constitutional reality on which that Constitution and that government were grounded.

Once the nation began as a federalist political entity, its future configuration would depend on equally fundamental political facts. Would the dynamics of its continued existence maintain the federal structure? Would the loyalties to the sub-units and the disagreements among those sub-units prove too strong, and lead to dissolution? Or would loyalties shift from the sub-units to the central government, and render the sub-units irrelevant? These questions depended upon the fundamental attitudes of the people, the elites, and the political leaders; they could not be answered by political morality because there is no moral basis for judging people's decision to aggregate themselves in larger or smaller units. Similarly, they could not be answered on the basis of the Constitution, because the answers to them determined the Constitution's limits and its force. And they certainly could not be answered on the basis of specific policies, even such a general one as liberty, because the answers determined the identity of the decisionmaking bodies that would select those policies.

For the first seventy-five years of the new nation's existence, the structure of its government was very much in doubt. On the one hand, the federal government succeeded in establishing a political apparatus, in attracting a considerable amount of loyalty, in maintaining a legitimate succession of leaders in accordance with its declared procedures for selection, in expanding its borders, fighting wars, and fostering spectacular economic growth. On the other hand, loyalties to the individual states continued to be strong, and the disagreements among these states were quite intense.[93] The first sectionalist crisis came when the United States joined the world-wide Napoleonic conflagration by declaring war on Britain. The war was begun

93. This is generally described as the era of dual federalism. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Harry Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOLEDO L. REV. 619 (1978); Harry Scheiber, *The Conditions of American Federalism: An Historian's View, in* AMERICAN INTERGOVERNMENTAL RELATIONS 67 (Lawrence J. O'Toole ed., 1993).

largely at the instigation of Southern and Western politicians, and pursued under the administration of James Madison, who was not yet perceived as an icon, but very much as a Virginian.[94] American troops rushed about from Florida to Canada with no clear purpose, while the British found time, in the midst of their deadly struggle with France, to burn Washington. Dissatisfaction ran high in the New England states, where concern about the disruption of its trade with Britain was intensified by dismay over the lack of military success. Connecticut virtually declared its independence, and representatives of various New England states gathered at Hartford in 1814 to threaten a more general secession.[95] However, Madison brought the war to its inconclusive end soon thereafter, and the irritation of the New England states subsided.

The conflict over slavery was not so readily resolved. It had been a major source of controversy at the Convention, leaving the Constitution scarred with the three-fifths clause, the fugitive slave clause, and the twenty-year protection of the overseas slave trade.[96] A *modus vivendi* was achieved in the next few decades, but ideological and technological developments conspired to bring this conflict to the forefront in the years that followed. The abolition of slavery in the North and the rapid growth of abolitionism there divided the nation ideologically. At the same time, the industrial revolution created an unprecedented European demand for American cotton, stimulating the opening of the Southwest and the vast expansion of the slave economy. That same phenomenon created a surge of wealth and population in the Northern states, further distancing them from the agricultural South and inducing Southern fears of being overwhelmed.

Peoples' response to this conflict had two aspects, reflecting the dual nature of political consciousness in a federalist regime. The first was a national debate about whether slavery was permissible or desirable. Opponents pointed to the moral horrors of the practice, and its debilitating effect upon the character of the slaveholders and to the economy of the region where it

94. *See* ROBERT A. RUTLAND, THE PRESIDENCY OF JAMES MADISON (1990).

95. *See* J. BANNER, TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS 1789-1815 (1970).

96. U.S. CONST. art. I, § 1, cl. 3; *id.* § 9, cl. 1; *id.* at art. IV, § 2, cl. 3; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS 1-33 (1996).

flourished.[97] Proponents responded that it was benign, that it was a means of maintaining civil order, and that the slaves in the South were treated better than industrial workers in the North or in Britain.[98] Some Northerners also argued that slavery violated the Constitution,[99] while Southerners—and here contemporary scholars would agree that they had the better argument[100]—claimed that it was specifically protected.[101]

Paralleling this national debate, however, was a second and essentially separate set of attitudes. As Robert Cover has pointed out, some abolitionists, conceding the force of the Southerners' claim that the Constitution authorized slavery, felt that the only moral position was opposition to the existing public order in its entirety, in other words, revolution.[102] John Brown's raid on Harper's Ferry was motivated by this belief. Much more widespread, however, was the belief of Southerners that the national government had no right to interfere with the

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97. For moral condemnations of slavery, see FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS (1845); RICHARD HILDRETH, DESPOTISM IN AMERICA (1854); HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (1852); HARRIET BEECHER STOWE, THE KEY TO UNCLE TOM'S CABIN (1853); THEODORE DWIGHT WELD, AMERICAN SLAVERY AS IT IS (1839). For condemnations of slavery's economic effects, see JOHN ELLIOT CAIRNES, THE SLAVE POWER: ITS CHARACTER, CAREER AND PROBABLE DESIGNS (1969); HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (1968); FREDERICK LAW OLMSTEAD, A JOURNEY IN THE BACK COUNTRY (1860); FREDERICK LAW OLMSTEAD, A JOURNEY IN THE SEABORD SLAVE STATES (1856).

98. *See, e.g.*, GEORGE FITZHUGH, A SOCIOLOGY FOR THE SOUTH; OR, THE FAILURE OF A FREE SOCIETY (1854); GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS (1857); HENRY HUGHES, A TREATISE ON SOCIOLOGY, THEORETICAL AND PRACTICAL (1854). For an analysis, see WILLIAM SUMNER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH (1935); HARVEY WISH, GEORGE FITZHUGH, PROPAGANDIST OF THE OLD SOUTH (1943).

99. *See, e.g.*, WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (1844); LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845); JOEL TIFFANY, THE UNCONSTITUTIONALITY OF SLAVERY (1849).

100. ROBERT COVER, JUSTICE ACCUSED 131-58 (1975) (referring to the belief that the Constitution prohibited slavery as constitutional utopians); STAUGHTON LYND, CLASS CONFLICT, SLAVERY AND THE UNITED STATES CONSTITUTION (1967); Finkelman, *supra* note 96, at 1-33. *But see* William Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81 (1972).

101. *See* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860 (1981). The case law overwhelmingly favored the Southern position. *See* Abelman v. Booth, 62 U.S. (21 How.) 506 (1859); Dred Scott v. Sanford, 60 U.S. (19 How.) 707 (1858); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); *In re* Susan, 23 F. Cas. 444 (C.C. Ind. 1818).

102. COVER, *supra* note 100, at 150-54; *see* WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT (1844).

institution of slavery.[103] Because of their commitment to this institution, their primary loyalty lay with the state governments that supported it, and not with the national government that was increasingly dominated by non-slaveholders or outright abolitionists. Based on these attitudes, they saw the United States in strongly federalist terms—a collection of thirty-three separate political entities, each with a primary and inviolate jurisdiction.[104] Any effort by the national government to abolish slavery was ultra vires, and would thus be met with resistance, or, if necessary, secession.

Thus, the conflict between North and South was partially a conflict about federalism, about whether the United States was a single polity, at least with respect to the slavery issue, or thirty-three related polities that were autonomous regarding that issue. This was far too fundamental a conflict to be resolved by moral principles or constitutional argument, since it placed the nature of the political order and the scope of the Constitution into question. It could only be resolved by basic changes in people's attitudes, or by force. As so often happens, force was the preferred approach. The South asserted its autonomy by armed insurrection, and the North persuaded it to remain within the Union by killing its people, burning its farms, and occupying its cities.

B. The National Era (1865-Present)

Even at the time, the Civil War was recognized as a defeat for the federalist conception of the United States, and the progenitor of a new political ordering. When George Thomas, the stolid Union general who smashed the Confederate armies in Tennessee, laid out a military cemetery at Chattanooga battlefield, he was asked whether the Union dead should be grouped by states. "No-no," he answered, "mix 'em up, mix 'em up. I'm tired of states' rights."[105] The Radical Republicans who

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103. The most noted proponent of this view was John C. Calhoun. JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (1853). *See* J. NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION (1988); AUGUST SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN (1951).

104. Calhoun's view was precisely that any action required the assent of both the central government and the governments of the sub-units. CALHOUN, *supra* note 103, at 28-35. Thus, he argued for joint responsibility and authority based on the reality of dual political consciousness.

105. *See* BRUCE CATTON, THIS HALLOWED GROUND 302 (1955).

dominated the National government following the Civil War found states' rights equally fatiguing. They occupied the South with government soldiers, replaced the existing state governments with new people, many of them freed slaves or Northerners, and tried, however fitfully, to reorganize the economic system.[106]

According to Bruce Ackerman, the Civil War Amendments, also the product of Radical Republican efforts, represented a transformation of the American political order. In effect, the Amendments granted the police power, the power of general jurisdiction, to the national government. They thus represent a constitutional moment, a departure from ordinary politics when public opinion is mobilized and acts upon the basic structure of the government.[107] Ackerman is certainly correct in noting that the Amendments were not ordinary emendations of the Constitution, and that they were the product of a much more nationalist mentality than anything in America's previous experience. Their ongoing effects, however, were more limited. The furious enthusiasm of the Radical Republicans faded, the national military withdrew from the Southern states, and the Redeemer movements delivered these states back into the tainted hands of their antebellum elites.[108] The statutes enacted to implement the Amendments were invalidated, repealed, or ignored.[109] By the turn of the century, these Amendments were being used by the judiciary to combat Progressive legislation, rather than either protecting African-Americans or expanding national authority.[110]

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106. *See generally* ERWIN BRADLEY, THE TRIUMPH OF MILITANT REPUBLICANISM (1964); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1867 (1988); KENNETH STAMPP, THE ERA OF RECONSTRUCTION 1865-1877 (1965).

107. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 YALE L.J. 1013, 1044 (1984).

108. *See* WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869-1879 (1979); LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979); MICHAEL PERMAN, THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869-1879 (1984); C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1956).

109. *See* Civil Rights Cases, 109 U.S. 3 (1883) (invalidating Civil Rights Act of 1875); United States v. Harris, 106 U.S. 629 (1883) (invalidating portions of the Civil Rights Act of 1871); Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (repealing voting rights provisions of the Enforcement Act of 1870 and the Force Act of 1871); MILTON KONVITZ, A CENTURY OF CIVIL RIGHTS (1967); LITWACK, *supra* note 108.

110. *See* Lochner v. New York, 198 U.S. 45 (1905) (holding state maximum hours legislation violates due process clause); Adkins v. Children's Hosp., 261 U.S. 525

The nationalizing efforts of the Radical Republicans and their Amendments were stillborn, or at least delayed, but other forces were working to shift people's loyalties from the states to the national government. The first of these was the tidal wave of immigration from Europe, particularly from areas outside the British isles. For the most part, these immigrants were not coming to New Jersey or Nebraska but to America.[111] As newcomers, with few prior links to any region, their loyalties tended to be with the nation as a whole. Over time, networks of relationships and natural affinity tended to produce clusters of these immigrants, but these were more often neighborhoods in many different states than one single cluster in a given state.[112]

A second nationalizing force was late nineteenth century technology, a phenomenon noted by H.G. Wells:

> Had the people of the United States spread over the American continent with only horse traction, rough road, and letter-writing to keep them together, it seems inevitable that differences in local economic conditions would have developed different social types, that wide separation would have fostered differences of dialect and effaced sympathy, that the inconvenience of attending Congress at Washington would have increased with every advance of the frontier westward, until at last the States would have fallen apart into a loose league of practically independent and divergent nations. Wars, for mineral wealth, for access to the sea, and so forth, would have followed, and America would have become another Europe.
>
> But the river steamboat, the railway, and the telegraph arrived in time to prevent this separation, and the United States became the first of a new type of modern transport state, altogether larger, more powerful, and more conscious of its unity than any state the world had ever seen before. For the tendency now in America is not to diverge but assimilate, and citizens from various parts of the States grow not more

(1923) (holding state maximum hours legislation violates due process clause).

111. *See, e.g.*, OSCAR HANDLIN, IMMIGRATION AS A FACTOR IN AMERICAN HISTORY (1959); OSCAR HANDLIN, THE UPROOTED (1951); MARCUS LEE HANSEN, THE IMMIGRANTS IN AMERICAN HISTORY (1940); STANLEY LIEBERSON, A PIECE OF THE PIE: BLACK AND WHITE IMMIGRANTS SINCE 1880 (1980).

112. *See* WILBUR ZELINSKY, IMMIGRATION SETTLEMENT PATTERNS: THE CULTURAL GEOGRAPHY OF THE UNITED STATES (1973).

> but less unlike each other in speech and thought and habit.[113]

Third, and most important, was the advent of the administrative state. The railway that Wells saw, with his typical perspicacity, as a unifying device was also an engine of great oppression, a nationally-organized behemoth that reached into America's previously isolated communities with overwhelming force. No state government had the resources or the scope of jurisdiction to address this problem effectively, and the task fell to the federal government. That government responded—America had a well-ensconced anti-regulatory tradition, but tradition tends to succumb in the face of something like a railroad—by passing the Interstate Commerce Act[114] and establishing the first federal regulatory agency.[115] From then on, both railroads and shippers would look to the federal government to set the carrying rates, and would fight their battles in that forum. Other Progressive legislation followed to deal with other aspects of the national economy.[116] The Sherman Act,[117] and later the Clayton Act,[118] placed the nation-wide trusts under federal authority. The Federal Trade Commission Act[119] extended that authority to the relationship between all business concerns and their customers. While banks were generally restricted to a single state, the flow of funds was national, and in 1913 Congress regulated it through the Federal Reserve Act.[120] In 1908, a national police force was established,

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113. H.G. WELLS, THE OUTLINE OF HISTORY 1006 (1949).

114. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.). This Act was passed despite a well-esconced anti-regulatory tradition in America. Tradition tends to succomb in the face of something like a railroad.

115. On the ICC as the ur-agency of the American administrative state, see JOHN A. ROHR, TO RUN A CONSTITUTION 90-110 (1986).

116. On the development of the administrative state in the Progressive Era. *See generally* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963); DWIGHT WALDO, THE ADMINISTRATIVE STATE (1948); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967); STEPHEN SKOWRONECK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920 (1982); ROHR, *supra* note 115, at 90-110.

117. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

118. Act of Oct. 15, 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27 (1994)).

119. Act of Sept. 26, 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-58 (1994)).

120. Act of Dec. 23, 1913, ch. 6, 38 Stat. 251 (codified as amended at 12 U.S.C.

now politely known as the Federal Bureau of Investigation.[121] The Sixteenth Amendment, which vastly expanded the national government's revenue-raising power, and the Seventeenth Amendment, which took the selection of Senators away from the state legislatures,[122] represent the culmination of the Progressive Era's nationalizing force.

After a brief lull during three Republican administrations that were as notable for their inactivity as their conservatism, the process resumed with the New Deal.[123] A large proportion of the remaining business sector fell under direct federal regulation, including consumer banking, securities, aviation, labor relations, and, until the National Industrial Recovery Act was invalidated, commerce in its entirety.[124] World War II saw a massive increase in the federal government's operations, and a temporary extension of its power to include industrial planning and price control.

The Eisenhower years are often regarded as another hiatus. It is true that the pace of regulatory expansion slowed, but the Cold War was on, and Americans looked to the national government, or perhaps were persuaded to look to the national government, to protect them from increasingly terrifying enemies and to induce or compel people in every corner of the world to become capitalists.[125] In the 1960s and 1970s, concerns for social justice

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§§ 221-522 (1994)).

121. The Act of May 22, 1908, ch. 186, § 1, 35 Stat. 236, provided funds from which the Bureau, known as the Bureau of Investigation in the Department of Justice, was created. It was designated the Federal Bureau of Investigation by the Act of March 22, 1935, ch. 39, 49 Stat. 77 (codified at 28 U.S.C. §§ 531-540A (1994)).

122. *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997).

123. On the New Deal generally, see JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX (1956); PETER IRONS, THE NEW DEAL LAWYERS (1982); WILLIAM E. LEUCHTENBURG, FRANKLIN ROOSEVELT AND THE NEW DEAL (1963).

124. The NRA was declared unconstitutional in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). Even during the Republican presidencies of the 1920s, federal regulation expanded. Broadcasting was regulated in 1927 by the Radio Act, ch. 169, 44 Stat. 1162 (1927), although the scope of this regulation was expanded in the New Deal by the Federal Communications Act, ch. 652, 48 Stat. 1064 (1934) (codified as amended in 47 U.S.C. §§ 151-612 (1994)).

125. *See* H.W. BRANDS, THE DEVIL WE KNEW: AMERICANS AND THE COLD WAR (1993); PAUL CHILTON, SECURITY METAPHORS: COLD WAR DISCOURSE FROM CONTAINMENT TO COMMON HOUSE (1996); MATTHEW S. HIRSHBERG, PERPETUATING PATRIOTIC PERCEPTIONS: THE COGNITIVE FUNCTION OF THE COLD WAR (1993); MELVYN P. LEFFLER, THE SPECTER OF COMMUNISM: THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1917-1953 (1994); GUY OAKES, THE IMAGINARY WAR: CIVIL DEFENSE

led to federal regulation of all commercial activity to secure civil rights, consumer protection, worker safety, and environmental quality. The last two decades have produced a great deal of talk about deregulation, but no significant withdrawals of federal authority; indeed, the talk indicates little more than a collective amazement at how extensive the role of the national government has become.

The results of these nationalizing trends have been both cultural and political. Culturally, the United States has become homogenized into a unified nation, with less diversity from one region to another than postage-stamp sized places such as Belgium, Senegal, or Laos.[126] It is no longer fashionable to describe America as a melting pot, although the newfound sense of ethnic identity that currently prevails is often built on trivial differences or long-abandoned attitudes. But if America is in fact a stew of identifiable components, rather than an undifferentiated mass, it is a rather evenly distributed stew.[127] Most ethnic groups are found in most areas of the nation, and those that were previously concentrated in one state or region have been dispersed by the ease of transportation, the excellence of communication, and the dynamism of the economy. Prior to World War II, for example, African-Americans were heavily concentrated in the South, but they have since followed the opportunities offered by industry into other parts of the country.[128] Similarly, Chicanos have migrated from the Southwest, Jews from New York, and Germans from the old Midwest.

These migration patterns are paralleled by other cultural phenomena that many people find distasteful, but most agree are powerful. Since World War II, American cities have come to look the same, slowly dissolving into mile after mile of linear highway strip lined with identical outlets of mass marketing that began

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AND AMERICAN COLD WAR CULTURE (1994).

126. This is recognized both by those who welcome this trend, such as Tushnet, and those who decry it, such as Nagel. *See* Articles this Symposium.

127. *See* Peter H. Schuck, *Some Reflections on The Federalism Debate*, Symposium Issue YALE L. & POLICY REV. 1 (1996).

128. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992). Hacker argues that segregation in housing, schools, and other areas remains extensive, but this segregation is by neighborhood, not by state. No state is more than 35% African-American; fully 30 states are over 4.0% (the nation as a whole being 11.9% African-American). Most of the states below 4.0% are the sparsely populated ones.

with fast food and gasoline, and now include toys, electronic goods, discount housewares, and motels. At the same time, local newspapers and local argots have been pounded into irrelevance by the successive development of motion pictures, radio, television, cable, and video cassettes, all of which project national news and entertainment into every community and every home. We are rapidly progressing beyond the point where people from one part of the country merely feel comfortable in another, and are reaching the point where people cannot tell what part of the country they are in, except for the fragments of the natural world that are visible between commercial structures, fragments that are themselves obscured if the people are inside one of America's thousands of identical-looking malls.

Politically, the administrative state has shifted the focus of attention to the national government. That government now intervenes in people's everyday lives by regulating their businesses, monitoring their environment, providing social benefits, and requiring consumer information. In addition, America has become increasingly involved in international affairs over the course of the twentieth century, and the federal government is necessarily the predominant, and usually exclusive, force in this arena. The issues that animate Americans tend to be national issues, and concern the proper policies for the national government to adopt.

As a result of the mass media, news about national events is projected into every home, and people's heavy reliance on the media means that the national news is their source of information and their locus of concern.[129] There is local news as well, but the national news is more dramatic, more fully presented, and more intensely debated. It is said that state or local governments are closer to the people, but what government is closer to the average family than their television set? Most Americans could recount the minor foibles and peccadillos of presidential candidates more readily than they could name the people running for their state legislature, local school board, city council, or the other minor and uninteresting positions that bear an alleged proximity to their lives.

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129. *See* JEAN BAUDRILLARD, SIMULATIONS (1983); RONALD COLLINS & DAVID SKOVER, THE DEATH OF DISCOURSE (1996); MURRAY EDELMAN, CONSTRUCTING THE POLITICAL SPECTACLE (1988); JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Berger, trans. 1991).

These cultural and political forces have rendered federalism irrelevant in contemporary America. Federalism is a political expedient to achieve partial unity when people are divided into territorial groups, with identifiable differences between them and a sense of loyalty to their particular group. In the United States, there are no longer any such territorial groupings; everyone lives in the same place, and that place is a vast, interacting, homogenized national culture.[130] Thus, no compromise is required and no expedient is necessary. Americans have diverse views, and belong to various interest groups, but the conflicts among those interest groups are national ones, played out in a national arena. To be sure, some of these groups have a territorial character. Farmers live in rural areas, and entrepreneurs who want to exploit the National Forests tend to live in the West, where the National Forests are located.[131] But even these groups are spread across large regions, and their loyalty lies with people like themselves, not people in their geographic area. The ranchers who want to graze their cattle on federal lands are pleased to characterize themselves as "the West," but they are just an interest group defined by their proximity to a particular resource, not by a geographic region. Los Angeles is also in the West, it has more people than there are in all the rural areas of that region, and its citizens have a far greater affinity with New York City than with their fellow Westerners.[132]

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130. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism,* 90 MICH. L. REV. 761 (1992) (lack of genuine cultural differences among states).

131. On this "Sagebrush Rebellion," see RICHARD D. LAMM & MICHAEL MCCARTHY, THE ANGRY WEST (1982); LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY MOVEMENT (John Echeuerma & Raymond Booth Eby, eds. 1995); Bruce Babbitt, *Federalism and The Environment: An Intergovernmental Perspective of the Sagebrush Rebellion,* 12 ENV. L. REV. 847 (1982); Robert Jerome Glennon, *Federalism As A Regional Issue: 'Get Out! And Give Us More Money,'* 38 ARIZ. L. REV. 829 (1996). If the desire to obtain greater advantage from proximate resources is sufficient to define a distinctive sub-culture, then there are a great many more sub-cultures than anyone previously thought; for example, a city's announcement to place a halfway house for heroin addicts on Tenth Street and Adams Avenue would generate a separate community, meriting recognition of its cultural heritage, in the area between Ninth and Eleventh Streets and Washington and Jefferson Avenues. The Sagebrush Rebellion, as Glennon points out, has some historical roots, but is basically a localized interest group.

132. James Gardner makes the interesting observation that even when state courts invoke the value of states as laboratories—one of the leading justifications for federalism—they are actually thinking in national terms and undermining state autonomy. James A. Gardner, *The "States-as-Laboratories" Metaphor in State*

Could federalism be revived and made relevant once more? Perhaps, but why would anyone want to? Federalism requires the divided loyalties; it requires a nation with territorial sub-groups that command political loyalty and draw support away from the central government. To render it relevant, Americans would need to work sedulously to exacerbate the differences between themselves, to generate conflicts, and to break the links that connect people to like-minded others in different parts of the nation.[133] It is not fashionable to be patriotic—and that is, by and large, a good thing—but Wells certainly seems correct in observing that American unity is a splendid political achievement.[134] To forge a single polity of so many diverse peoples, spread across so vast an area, is remarkable, and worth preserving. The federalist period of American history, after all, culminated in a civil war. This is not surprising, for federalism is a balancing act, and when the balance is upset, secession or armed conflict is likely to result. The nationalist period has produced one of the most stable governments in Western history, a taken-for-granted political framework that has, among other achievements, vitually eliminated deaths from internal conflict. Stability is not a political order's only virtue, of course, but one need only look at Northern Ireland, Bosnia, Rwanda, and Lebanon to perceive its advantages. Social change is also desirable, particularly when the existing order is unjust, but a politically stable regime is as likely to produce such changes as a fractured one. In short, the loyalty of the people to the central government is an invaluable national resource. There is no obvious reason to take affirmative steps to destroy or decrease it.

C. The Remnants of Federalism

If federalism is irrelevant, if it is a political expedient that the United States does not need, why is there so much talk about it? There appear to be three things that keep federalism talk alive: nostalgia, opportunism, and decentralization. None of these is a serious argument for federalism and, indeed, each generally has little relationship to it as a real political concept. But this does

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Constitutional Law, 30 VALPARAISO U. L. REV. 475 (1996).

133. *See* ALVIN RABUSHKA & KENNETH A. SHEPSLE, POLITICS IN PLURAL SOCIETIES: A THEORY OF DEMOCRATIC INSATIABILITY (1972).

134. *See supra* note 113 and accompanying text.

not mean that federalism is entirely irrelevant in the contemporary American experience. In fact, it is a potential source of social justice for some American Indian tribes, and an operative principle for Puerto Rico, American Samoa, Guam, and the U.S. Virgin Islands, at least according to the expansive definition offered above. Of course, this is not what comes to mind for most Americans when the term federalism is invoked, but the disjunction only indicates how sharply the contemporary debate diverges from any coherent understanding of the concept.

Although federalism is currently irrelevant, it was certainly an operative principle of American government for the first seventy-five years of the nation's existence. Up until World War II, it continued to play a role, albeit an increasingly unimportant one, in America's political sensibilities. Because our current, homogenized, commercialized, media-drenched national polity is distasteful to many people, our past—the federalist past—serves as a natural object of yearning. It is part of the good old days, along with bandstands in the park, horse-drawn carriages, women who acted like ladies, and wars that were fought by men and not machines. This is an understandable sentiment, but it is not a harmless one, for it addles our minds with all sorts of retrograde, counter-productive notions. It becomes particularly sinister when the nostalgia is directed toward an institution that can no longer be openly mourned, namely slavery. Slavery was by far the greatest distinguishing factor between states in the antebellum period. Ever since the South's defeat in the Civil War, there has been an ongoing moonlight-and-magnolia, gone-with-the-wind, lost-but-glorious-cause mentality that conceals the deep and inherent racism behind the facade of nostalgia. When Alabama, a state with a twenty-five percent African-American population,[135] adopts the Confederate flag as its symbol and defends its right to do so on federalist grounds, it is simply reflecting the continued link between federalism, nostalgia, and retrograde opinion.

A second reason for the continued references to federalism is political opportunism. Because it was part of the Framers' perspective, and a crucial element in the politics of America's early years, federalism has an august sound to it. It thus

135. *See* HACKER, *supra* note 128, at 228. Proportionally, Alabama has the fifth largest African-American population among American states.

becomes a rhetorical weapon that can be wielded in political debate. Unlike physical weapons, rhetorical ones are always at hand, and often get sharper and shinier the more they are used. Thus, whenever federal policy differs from the policies in a significant number of states, federalism will be invoked by those who agree with the state policies. Throughout the 1950s and 60s, it was a rallying cry for segregationists and the anathema of liberals. Once the national government fell into the hands of the Republicans, and particularly after the Supreme Court's decision in *Bowers v. Hardwick*,[136] the position began to reverse, as liberals discovered the virtues of federalism and conservatives became aware of its defects.[137]

Disagreements among political sub-units are a hallmark of real federalism, of course. What renders the current use of federalism opportunistic, rather than genuine, is that the policy variations among states, or between some states and the national government, are part of a national political debate, not reflections of geographically-delimited views. In every nation, no matter how homogenized, some areas will be more liberal, others more conservative. Very often, the most important determinant is whether the area is urban or rural. Administrative subdivisions in those areas will tend to reflect the attitude of their residents, particularly in a democracy. But in the contemporary United States, there are no states, with the possible exceptions of Utah and Hawaii, where the differing political positions are based on a generalized and distinctive culture, or a different set of attitudes from those in other states. There are merely opposing positions in a national debate, just as farmers and city dwellers, religious and secular people, blacks and whites, or old people and young ones may have different views.

The state variations, however, awaken the distant recollection of federalism, and those who favor particular state views can thus invoke federalism as an additional argument in favor of their position. They do not really mean it, and they will abandon

136. 478 U.S. 186 (1986). Moods may shift again in the wake of Romer v. Evans, 116 S. Ct. 1620 (1996), where a state government supported the anti-gay rights position and the U.S. Supreme Court overturned its action.

137. *See* William Brennan, Jr., *The Bill of Rights and The States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Elizabeth Levano, Comment: *New Hope for the New Federalism: State Constitutional Challenges to Sodomy Statutes*, 62 U. CIN. L. REV. 1029 (1994); Merritt, *Republican Governments*, *supra* note 5.

federalism as soon as the state variations do not support their independently-determined values.[138] Thus, the Republicans came to Washington in 1994 talking federalism because they favored business and wanted deregulation. Once there, they proposed to nationalize tort law because they realized that they could favor business by reducing litigation.[139] This is what Habermas calls strategic, rather than communicative action,[140] what Murray Edelman calls symbolic politics,[141] and what Jean Baudrillard calls hyperreality.[142] Habermas would like to eliminate it, but, at least for now, that is the way the game of politics is played.

The third phenomenon that keeps federalism talk alive is the continued, and often persuasive support for decentralization.[143] There are many reasons to decentralize; under proper circumstances, decentralization can lead to better quality decisionmaking, the production of new ideas, the facilitation of experiments, and a healthy competition between rival managers.[144] Jenna Bednar and William Eskridge have provided thoughtful analysis of these reasons, balancing preference satisfaction against shirking, externalities, and protectionism by states.[145] Joshua Sarnoff has provided

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138. *See* Frank Easterbrook, *Antitrust and the Economics of Federalism,* 26 J.L. & ECON. 23, 43 (1983); Harry Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System,* 14 L. & SOC. REV. 663, 664 (1980).

139. For a general discussion of this litigation, see Michael Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers,* 48 RUTGERS L. REV. 673 (1996).

140. HABERMAS, *supra* note 21, at 273-337.

141. MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); EDELMAN, *supra* note 129.

142. JEAN BAUDRILLARD, IN THE SHADOW OF THE SILENT MAJORITIES (1983); BAUDRILLARD, *supra* note 129. The concept of hyperreality is slightly different, since it refers to the replacement of real events with their media images, but one could point to a wide variety of media images that contribute to our elegiac attitude toward federalism.

143. *See* Rubin & Feeley, *supra* note 15.

144. *See* ERNEST DALE, ORGANIZATION 104-30 (1967); MANFRED KOCHEN & KARL DEUTSCH, DECENTRALIZATION: SKETCHES TOWARDS A RATIONAL THEORY (1980); WILLIAM J. MORRIS, DECENTRALIZATION IN MANAGEMENT SYSTEMS (1968); Kenneth J. Arrow & Leonid Hurwicez, Essay, *Decentralization and Computation in Resource Allocation, in* ESSAYS IN ECONOMICS & ECONOMETRICS 34 (Ralph W. Pfouts ed., 1960). None of these sources recommends granting indefeasible rights to decentralized sub-units.

145. *See* Bednar & Eskridge, *supra* note 5; Sarnoff, *supra* note 29. Although the authors cast their discussion in terms of federalism, the analysis they advance is applicable to a decentralized political system. It is not clear why this analysis,

thoughtful reasons why the decentralization of power to the states is likely to undercut the effectiveness of national programs. But all of these strategies only make sense once a goal, or overall approach, has been adopted; it is the existence of that goal and its centralized adoption that makes these strategies decentralization rather than federalism. Political traditions being what they are, it is natural for our national government to use the nation's former federalist divisions, namely the states, as the operative sub-units of a decentralized management strategy. This leads to confusion between two essentially different governmental approaches: decentralization, where a single polity transfers decisionmaking authority to its subdivisions in order to achieve its own centrally defined goals more effectively; and federalism, where the national government and its sub-units are separate decisionmaking political entities, each with their own goals.

The conflation of these two different approaches is probably the major factor in keeping federalism talk alive, for there are many good reasons to favor decentralization. But the distinction between the two becomes clear once it is recalled that federalism only exists when the sub-units have some claim of right against the central government. A political entity may decide to decentralize, in the interest of efficient management or some other identified goal, but it would have no reason to grant definitive rights to its sub-units. Any advantage of decentralization can be obtained without granting such rights and many might be greatly facilitated if the two concepts were disaggregated.[146] By adopting federalism, the decisionmaker would be disabling itself from recentralizing, rearranging, or otherwise altering its structure if it found that some other approach enabled it to more effectively achieve its goals. No decisionmaker would do so unless the sub-units could make some claim to a separate political identity.

Thus, as long as the nation is the locus of collective political identity, as long as the national government is the effective

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despite its legal process concerns about political accountability, needs to be constitutionalized. The point here, however, is that states no longer provide an adequate basis for constitutional invalidation of Congressionally-enacted legislation.

146. *See* Richard Briffault, *Our Localism (Pts. I & II)*, 90 COLUM. L. REV. 1, 346 (1990); Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997); Judith Resnick, *Federalism's Options*, Symposium Issue YALE L. & POLICY REV. 465 (1996); Mark Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981 (1985).

decisionmaker, the transfer of decisionmaking authority to political sub-units will represent a policy of decentralization, not federalism. No one confuses the two in France, where the national government abolished the traditional, and previously federalist, provinces and replaced them with uniformly sized departments designated with dull geographic names like Upper Rhine, Lower Rhine, High Pyrenees, and Low Pyrenees.[147] In the United States, however, the continued identity of the former federalist states and the current administrative subdivisions of the nation produces confusion, and keeps federalism talk in circulation.

Nonetheless, federalism is relevant to the United States, at least according to the broad, inclusive definition offered above. It no longer applies to the states, or to the vast majority of Americans, who have become members of a national polity. But the United States also rules over the indigenous Indian population that formerly occupied its entire territory, and also rules over some additional territories that it acquired by conquest, occupation, or purchase, and that have either indigenous populations or immigrant populations that are quite distinct from that of the United States in general. As Judith Resnick has suggested, with respect to Indian tribes, these are the areas where federalism is relevant and where it has been implemented.[148]

Federalism cannot apply to the entire Native-American population. It is a mechanism limited to territorial sub-units, and many Native Americans, particularly the Eastern tribes, have been deprived of the vast majority of their land. For them, social justice and cultural protection must come, if at all, by means of what Kymlicka calls polyethnic rights.[149] But there are a number of tribes that still possess significant amounts of territory, on which a significant proportion of their members reside. When these territorial groups possess partial autonomy, that is, claims of right against the central government, then federalism is being used as a political expedient to mediate between their separate existence as a tribe, or "nation," and their inclusion within the United States. Of course, it is federalism only if the residents of the reservation truly identify with their

147. ALFRED COBBAN, I A HISTORY OF MODERN FRANCE 169-71 (1957).
148. Resnick, *supra* note 146.
149. KYMLICKA, *supra* note 13.

tribe, and feel a dual loyalty to the tribe and the central government. If they are fully assimilated Americans, who are being granted certain privileges because of their historic origins, then the arrangement is not really a federalist one. Rather, it is simply a central government policy designed to counteract the effects of past injustices, discrimination, or disadvantage, like affirmative action for Afro-Americans, or bilingual education for Hispanic and Latino Americans.

The political status of America's overseas possessions—American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands—is, however, unambiguously federalist.[150] These areas, all islands as it happens, have either a distinctive, indigenous population, or an immigrant population that is distinguishable from that of the United States. Each possesses its own culture and with the exception of the Virgin Islands, a language that is different from the dominant language in the main part of the nation. In each, people's loyalties are divided, with much of their sense of political identity resulting from their membership in their particular sub-unit. Federalism has been used in all four cases as an expedient way to govern in this situation. The national government possesses authority in certain areas; for example, it exercises plenary authority over foreign relations, as complete as it does with respect to a state. But the government of the sub-unit exercises extensive authority in other areas, an authority designed to implement the preferences of a population that sees itself as a separate group. It is significant that the populations of these four territorial sub-units, which are infinitesimal by American standards for all but Puerto Rico, have not been granted full American citizenship. It is difficult for a unitary regime to assimilate the populations of truly federal sub-units into its political structure.

The point is not that the existing arrangements with these four possessions are just, or optimal; the point is that they are federalist. Their variance from the political ordering that applies to other Americans indicates how irrelevant federalism is to the contemporary life of most Americans.

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150. *See* CHARLES BEARDSLEY, GUAM, PAST AND PRESENT (1964); EDGARDO MELENDEZ, PUERTO RICO'S STATEHOOD MOVEMENT (1988); NANCY MORRIS, PUERTO RICO: CULTURE, POLITICS AND IDENTITY (1995).

CONCLUSION

Federalism is a bit like abdominal surgery. It can save the political life of a nation under certain circumstances, but it is not benign and should not be resorted to without a reason. It can be divisive, exaggerating political differences that might otherwise have dissipated over time, and exacerbating conflicts that might otherwise have been resolved. Moreover, because it grants political sub-units definitive rights against the central government, it means that some residents of those sub-units are likely to be treated in a way that the majority of the nation regards as wrong, and even immoral. Perhaps the reason why people are talking about federalism more these days is that we have managed so well without it that we have forgotten its dangers. It held our sharply-divided nation together for seventy years, but only by allowing millions of Americans to be held in slavery long after the majority of whites had recognized the horrors of that institution, and only by preserving sectional differences that sent the national spiralling into civil war. We have done a lot better—not perfectly, but better—in the past seventy years, during which federalism has quickly declined into irrelevance. We are unlikely to revive federalism—certainly, a few Supreme Court cases will not do so—but we would be ill-advised even to try.